IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-7501

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO DISTRICT COUNTY COUNCIL OF CARPENTERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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SEARS, ROEBUCK AND CO.,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, Sears, Roebuck and Co., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered in this case on September 2, 1976.

OPINIONS BELOW

The opinion of the California Superior Court for the County of San Diego is unreported and is reprinted as Appendix A hereto. The initial decision of the California Court of Appeal, Fourth Appellate District, is reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975), and is reprinted as Appendix B hereto. The order of the Supreme Court of California granting hearing and retransferring the case back to the Court of Appeals is not reported and is reprinted as Appendix C hereto. The subsequent opinion of the California Court of Appeal is

reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975), and is reprinted as Appendix D hereto. The opinion of the California Supreme Court is not as yet reported, and is reprinted as Appendix E hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of California (App. E) both issued on September 2, 1976. This judgment is final for purposes of review by this Court. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551-52 (1944). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Are state courts preempted by the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, from determining whether the unauthorized entry of union pickets on private property constitutes a trespass.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (hereafter "the Labor Act") and the California Penal Code, Calif. Code Ann. § 602, are reprinted as Appendix F hereto.

STATEMENT OF THE CASE

Sears, Roebuck and Co. (hereafter "Sears") owns and operates a retail department store in Chula Vista, California. The store building itself is centered on a large rectangular-shaped piece of land and is the only store on the premises. Walkways abut the building on all four sides, and these in turn are surrounded by a large parking area except on one side which is bounded by a blockwall fence that separates private dwellings from the store

property. This property is posted against use by other than Sears' customers and against solicitation, distribution of handbills or other activity by nonemployees. The Sears' property is surrounded by a wide public sidewalk, as well as curbs at the street, where anyone walking is in full view of those persons entering the Sears' store.

On October 26, 1973, the San Diego County District Council of Carpenters (hereafter "the Union") established a picket line on the private walkway adjacent to the store to protest the fact that Sears was having carpentry work performed by carpenters who had not been dispatched from the Union's hiring hall. Sears notified the pickets that they were on private property and requested that they leave the property immediately. The pickets did leave, but returned a short time later.

When it became apparent that the pickets would not leave voluntarily, Sears sought an injunction in the San Diego County Superior Court. After argument, the Court issued a temporary restraining order on October 29, 1973, and a preliminary injunction on November 21, 1973, enjoining the Union, its agents, representatives and members from picketing on Sears' property. Both orders, however, expressly permitted picketing on the adjacent public property. App. A, pp. A2 and A3. There was no evidence introduced to demonstrate either that picketing at these public locations would be ineffective or that other alternative means of communication were not available to the Union.

An appeal was taken and the California Court of Appeal twice affirmed the issuance of the injunction. App. B. and D. The California Supreme Court, however, reversed. It held that "federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board . . . and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property." App. E, p. A33. The decision noted that this Court had left open

this question (App. E, pp. A40-41); that Chief Justice Burger had expressed a different view in *Taggart* v. *Weinacker's*, 397 U. S. 223, 227 (concurring opinion) (App. E, p. A43); that other Justices had also expressed concern about the hiatus created by a finding of preemption (App. E, p. 44, n. 7); and that the highest courts of other states had reached a contrary position (App. E, p. A46). The California Supreme Court nevertheless concluded that it was bound by this Court's "most recent ruling . . . the holding in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), which precludes state court jurisdiction over the labor dispute before us. Notwithstanding the views of individual members of the high court, the . . . court itself has not to date created a judicial exception to its *Garmon* ruling so as to except from it [the trespassory activities here at issue]." App. E, p. A44.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises an Important Question Which Has Not Been, But Should Be, Settled by This Court

Review should be granted in order to resolve a substantial, recurrent question not heretofore decided by this Court, *viz.*, whether, under *Garmon*, state courts retain jurisdiction to declare a trespass by union pickets on private property to be violative of state law.

This Court expressly left this question open in *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24-25 (1957). It has not thereafter decided the matter notwithstanding that certiorari has twice been granted on the very same question as that presented here: *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U. S. 308 (1968); *Taggart* v. *Weinacker's, supra*. In *Logan Valley*, the Court did not reach the preemption question (391 U. S. at 309, n. 1; see also the dissenting opinion by Mr. Justice Harlan, 391 U. S. at 333) and the issue was similarly left undecided in

Taggart when the writ of certiorari there was dismissed as improvidently granted. 397 U. S. at 226. However, in a concurring opinion in *Taggart*, Chief Justice Burger commented that, in his opinion, contrary to the decision of the California Supreme Court in this case:

> "[A]ny contention that the States are preempted is without merit. . . . Nothing in [*Garmon*] . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desire redress for illegal trespassory picketing. . . . A holding that Congress preempted this entire area is as inappropriate here as it was in *Linn* [v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)], and for precisely the same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. at 201, 25 L.Ed. 2d at 223 (White J., concurring)."

397 U. S. at 227-29. Mr. Justice Harlan's separate memorandum in *Taggart* disagreed with the Chief Justice's views, as well as the opinion of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *Ariadne*, for essentially the same reasons as those relied on by the court below. 397 U. S. at 229-231.

The instant case presents this Court with an appropriate vehicle to resolve this undecided question. A failure to decide the issue, on the other hand, would perpetuate a number of undesirable results: (1) the present uncertainty and conflict as to whether the states have jurisdiction in the instant circumstances to enforce their trespass laws, as shown by the following section, will continue with the consequence that the rights of unions and employers will vary from state to state; (2) states, such as California, which have concluded that their jurisdiction is preempted, will be unable to protect a "deeply rooted" state interest which is of only "peripheral concern" to the Labor Act—the protection of private property rights from trespass (*Taggart*, 397 U. S. at 227-229 (Burger, C. J., concurring)); and (3) property owners will have to rely solely on self-help to protect

their property from trespass, a situation which will "[create] disrespect for the law and [encourage] the victim to take matters into his own hands." *Linn*, 383 U. S. at 64, n. 6.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States

One of the reasons this Court granted certiorari in *Linn* was to resolve a similar preemption conflict, *i.e.*, the extent to which the Labor Act preempted state libel action jurisdiction, because "[t]he question . . . has been a recurring one in both state and federal tribunals." 383 U. S. at 57 (footnote omitted). For apparently the same reason, related preemption issues have frequently been determined by this Court in recent years.[1] The question presented in this case is of the same magnitude. The extent to which the Labor Act supercedes the jurisdiction of state courts to protect their constitutents' private property from trespass has been a recurrent question whose resolution has varied from state to state.

In diametic conflict with the decision below, the courts of many states have asserted jurisdiction, notwithstanding *Garmon*, to decide whether union pickets have trespassed on private property in violation of state law.[2] In fact, in just the last year,

1. See *e.g.*, *Hill* v. *Carpenters Union*, Case No. 75-804, *cert. granted* 44 U. S. L. W. 3427 (1976); *Machinists & Aerospace Workers* v. *WERC*, Case No. 75-185, ... U. S. ...., 92 LRRM 2881 (1976); *Connell Construction Company, Inc.* v. *Plumbers Union No. 100*, 421 U. S. 616 (1975); and *Amalgamated Assn. of Street, Electric Railway and Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

2. See, *e.g.*, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 385, *cert. den.*, 368 U. S. 927 (1961), where the Illinois Supreme Court enjoined picketing on a private parking lot; *Marriott Corp.* v. *Rosado*, 70 Misc. 2d 423, 333 N. Y. S. 2d 114 (1972), *aff'd*, 353 N. Y. S. 2d 924 (App. Div. 1974), where union picketing at various terminal buildings at Kennedy and LaGuardia Airports was enjoined; *Jack Loeks Enterprises* v. *Local 291*, 87 LRRM 3105 (No. 74 16697 CZ (Mich. Cir. Ct., Kent County, November 15, 1974), where a preliminary injunction was issued to re-

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the highest courts of both New York and Illinois have refused to preempt a state court jurisdiction where union trespassory activities were at issue. In *May Department Stores, et al.* v. *Teamsters Union Local No. 743*, 64 Ill. 2d 153, 163, 355 N. E. 2d 7, 11 (Sept. 20, 1976), decided only a few days after the decision in the instant case, the Illinois Supreme Court reaffirmed its position that "under the *Garmon* doctrine the states are not preempted from jurisdiction of a trespass action" where nonemployee union organizers solicited employees and distributed literature on a company-owned parking lot. Similarly, the New York Court of Appeals in *People* v. *Bush*, 39 N. Y. 2d 529, 349 N. E. 2d 832, 838 (May 4, 1976), held that union picketing on private property could be enjoined under state law because the union "deliberately placed itself in conflict with the exercise of the state's police powers."

Other state courts, however, like the California Supreme Court in the present case, have reached an opposite result and considered their jurisdiction preempted as a result of *Garmon*.[3]

The absence of a definite decision by this Court has thus occasioned conflicting state interpretations of federal law. The

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strain union picketing on the "parking lot, sidewalk, theatre building, or other associated areas" of a shopping center tenant; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wisc. 2d 499, 114 N. W. 2d 876 (1962), where the Wisconsin Supreme Court upheld an injunction prohibiting union members from picketing on the private property of a shopping center; and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S. W. 2d 766 (1964), where the Tennessee Supreme Court concluded that it had jurisdiction to enforce against union pickets a state statute which proscribed entering a business or standing outside it for the purpose of enticing anyone therefrom.

3. See, *e.g.*, *Hudgens* v. *Local 315, Retail, Wholesale and Dept. Store Union, AFL-CIO*, 231 Ga. 669, 203 S. E. 2d 478 (1974), *cert. den.*, 96 S. Ct. 1435 (1976), where the court similarly ruled that preemption applied; *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (1961), where the Supreme Court of Washington held that, since an action for trespass by a shopping center owner against a labor union was an "arguable subject" of the Labor Act, the court did not have subject matter jurisdiction; *United Maintenance Co.* v.

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continued existence of such different rules on an important issue of labor-management relations impairs the desired uniformity of national labor policy. Review by this Court is warranted, therefore, to provide guidance to the states and to "spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953).

C. The Court Below Misconstrued the Decisions of This Court

The court below misconstrued *Garmon*. That case expressly recognized that state jurisdiction is unimpaired where the activity involved—as in the case of trespass—is ". . . a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touches interests . . . deeply rooted in local feeling and responsibility . . ." 359 U. S. at 243-244. See also *Vaca* v. *Sipes*, 386 U. S. 171, 180 (1967), and the cases cited therein.

In the present controversy, the union picketing did not meet the basic *Garmon* test and, in addition, was encompassed by the exceptions thereto. *First*, unauthorized picketing on private property does not fall within either the proscription or protection of the Labor Act. As the Chief Justice observed in his concurring opinion in *Taggart*, "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U. S. at 227.[4] This unavailability of a remedy "vitiates the ordinary

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Steelworkers, 86 LRRM 2364 (No. 13405, West Va. Ct. App., 1974); where the court held that it lacked jurisdiction to enjoin a trespass; and *Hennerin Broadcasting Associates* v. *AFTRA*, 84 LRRM 2217 (No. 696356, Minn. Dist. Ct. 4th Dist., 1973), where the court denied a motion for a temporary order restraining union picketing on or near a radio station's premises on the ground that its jurisdiction was preempted.

4. See, *e.g.*, *Organizing and the Law, A Handbook for Union Organizers*, by Stephen I. Schlossberg, General Counsel, United

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arguments for preemption." *Linn* v. *United Plant Guard Workers, Local 114, supra.* Indeed, the Labor Board's own Assistant General Counsel has recognized that an "[a]pplication of the *Garmon* 'arguably protected' test in this situation leaves the employer's interest in an unsatisfactory condition. . . . The result is an undesirable as the 'no-man's land' created by the holding in *Guss* [v. *Utah Labor Relations Board*, 353 U. S. 1 (1957)]. . . ." Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435, 1444 (1971). See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1363 (1972); and Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev. 552, 558, 567 (1970).

Second, as this Court's decision in *Lloyd Corporation* v. *Tanner*, 407 U. S. 551, 557, 570 (1972), makes clear, "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected." These constitutional rights would be violated if the pickets are left free to continue their activities on Sears' property. See *Lenrich Associates* v. *Heydra*, 504 P. 2d 112 (Or., 1972). Failing to provide the property owner with a remedy in the circumstances of this case thus effects a deprivation of property without due process and just compensation. The situation is no different than that which would be occasioned if a state took affirmative action

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Automobile, Aerospace and Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, *he does so without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (emphasis added.)

through legislation to provide pickets with access to private property where other reasonable alternatives were available.

Finally, union trespass on private property, while only a peripheral concern of the Labor Act, is a matter deeply rooted in local concern. The California Court of Appeals in the present case, for example, declared that "[t]he values of real property and one's right to peaceful possession and control over it, though certainly not absolute, are basic in our state and are deeply rooted in local feeling and responsibility . . . Our courts consistentiy have provided a forum for the preservation of such values. . . ." App. D, p. A20. Chief Justice Burger similarly observed in *Taggart* that "the protection of private property . . . through trespass laws is historically a concern of state law." 397 U. S. at 227. There is, after all, an "overriding state interest . . . involved in the maintenance of domestic peace" (*Local 100, Association of Journeymen and Apprentices* v. *Borden*, 373 U. S. 690, 693 (1963)), and the basic purpose of trespass statutes is "the prevention of violence or threats of violence". *People* v. *Goduto*, 174 N. E. 2d at 387. The state courts are peculiarly equipped, without impinging upon federal labor policy, to regulate trespassory activity. Moreover, the Board can provide relief to the picketing union, if it deserves it, by either enjoining an improper order of a state court (see *N. L. R. B.* v. *Nash-Finch Co.*, 404 U. S. 138 (1971)), and/or by acting directly against the property owner seeking to exclude the union pickets. Cf. *Hudgens* v. *N. L. R. B.*, 424 U. S. 507 (1976); *Central Hardware Company* v. *N. L. R. B.*, 407 U. S. 539 (1972). During Board consideration of the dispute, however, the *status quo* is maintained and respect for the law preserved. *May Department Stores* v. *Teamsters Union Local 743, supra.*

The California courts thus should have concurrent jurisdiction, alongside the Labor Board, where there is unauthorized union entry on private property. This is not an unusual situation in labor law. The states and the Labor Board have concurrent authority in cases involving libel (*Linn* v. *Plant Guards, supra*),

breach of a union's duty of fair representation (*Vaca* v. *Sipes, supra*), picketing where there has been violence or threats of violence (*United Auto Workers* v. *W. E. R. B.*, 351 U. S. 266 (1956)), and as well as in other areas. See *Machinists & Aerospace Workers* v. *WERC*, ... U. S. at ....., 92 LRRM at 2882-2883, ns. 2 and 3. All of these situations, like trespass, involve areas of traditional state concern regulated by a state law of general application. In such cases, Congress did not deprive the states of their power to act; the Labor Act expressly "left much to the states" (*Garmon*, 359 U. S. at 240), including the right of the states to uniformly enforce their trespass laws.

CONCLUSION

For all the foregoing reasons, Sears, Roebuck and Co. respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
In and For the County of San Diego

SEARS ROEBUCK & COMPANY,
Plaintiff,
vs.
SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES I through 100,
Defendants.

No. 347511

ORDER GRANTING PRELIMINARY INJUNCTION

The above matter came on regularly for hearing on November 16, 1973 in Department 6 of the above entitled Court pursuant to an order to show cause why a preliminary injunction should not issue. Gray, Cary, Ames & Frye, by David B. Geerdes, appeared as counsel for plaintiff, and Brundage, Williams & Zellmann, by Thomas B. Manning, appeared as counsel for defendant, San Diego County District Council of Carpenters.

On proof being made to the satisfaction of the Court, and good cause appearing therefore;

It Is Hereby Ordered that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendant, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating

in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

It is further ordered that a preliminary injunction be issued as hereinabove set forth, upon plaintiff's filing and undertaking in due form, to be approved by this Court, in the sum of $1,000.00.

Dated this 21 day of November, 1973.

/s/ JOSEPH A. KILGARIF,
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
In and For the County of San Diego

SEARS ROEBUCK & COMPANY, *Plaintiff,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES 1 through 100, *Defendants.*	No. 347511

PRELIMINARY INJUNCTION

Pursuant to this Court's order granting a preliminary injunction, and the plaintiff's filing an undertaking approved by this Court in the sum of $1,000.00;

It Is Hereby Ordered that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

Dated this 21 day of November, 1973.

/s/ JOSEPH A. KILGARIF,
Judge of the Superior Court

APPENDIX B

Certified for Publication

IN THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT

Division One

State of California

SEARS ROEBUCK & COMPANY,
Plaintiff and Respondent,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,
Defendant and Appellant.

4 Civ. No. 14036
(Sup. Ct. No. 347511)

OPINION

Appeal from a judgment of the Superior Court of San Diego County. Joseph A. Kilgarif, Judge. Affirmed.

Brundage, Williams & Zellmann, and Jerry J. Williams, for Defendant and Appellant.

Gray, Cary, Ames & Frye, and David B. Geerdes, for Plaintiff and Respondent.

Sears Roebuck & Company (Sears) filed a complaint against the San Diego County District Council of Carpenters (Union) for an injunction (continuing trespass), and secured a temporary restraining order. The demurrer to the complaint was overruled and the issue set for hearing as a short cause on November 16, 1973. The preliminary injunction was granted on November 21, 1973, and the Union appeals.

In October 1973 the Union was informed by one of its members that Sears was performing certain carpentry work

in the store located at 555-5th Avenue in Chula Vista. Business agents of the Union visited the store and determined certain platforms and wooden structures were being constructed by persons who had not been dispatched from their hiring halls. The work was that which would be required of a "journeyman carpenter."

The Union agents called upon J. L. Ochoa, the store manager, and asked him to contract the work through a Union contractor or sign a short form agreement relative to use of Union carpenters and at prevailing Union wage scale. Ochoa advised the agents he would look into the matter but never reported back even though they made repeated attempts to reach him.

On the morning of October 26, 1973, the Union began picketing the store, walking back and forth in the parking lot next to the walkways on the north, west and east sides of the building. The pickets were peaceful, did not interfere with traffic and generally conducted their work without violence or threat of violence.

The Sears building is located 220 feet from 5th Avenue, 288 feet from H Street and 490 feet from I Street and is the only business at the location. The building is surrounded with a sidewalk and beyond that a parking area. The entire Sears location is surrounded with a city-owned sidewalk and curb at the street. The general public, of course, has access to the entire area. The restraining order required the pickets to keep off of the Sears-owned property, confining their pickets to the public sidewalks at the curb line of the public streets. Other Union sympathizers saw the pickets and refused to cross the lines but the Union contends the pickets are, in that position, out of view of the shopping public and are less effective. Since November 12, 1973, there have been no pickets at the Sears Chula Vista store.

The Union first contends the state courts have no jurisdiction in this sort of labor-management dispute and that both state and

federal courts must defer to the exclusive juirsdiction of the National Labor Relations Board.

State regulation of peaceful picketing[1] is subject to two principal limitations: (1) the free speech guaranty of the First Amendment; and (2) preemption of the field of regulation by the National Labor Relations Act (Act).[2] Under the Act the National Labor Relations Board (NLRB) may issue a cease and desist order or seek injunctive relief if it determines an unfair labor practice has occurred.[3] While neither the Act nor its legislative history provides for a preemption in the field of labor relations, the courts have held the NLRB has primary responsibility for dealing with the problem. In *Garner* v. *Teamsters, Chauffeurs and Helpers, Etc.* (1953), 346 U. S. 485, 490-491 [74 S. Ct. 161, 165-166], the United States Supreme Court said:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are

1. See generally 56 Virginia L. R. 1435, 83 Harvard L. R. 552.

2. 29 U. S. C. A. Section 151 et seq. The National Labor Relations Act (NLRA) is encompassed in the Labor Management Relations Act (29 U. S. C. A. Section 141 et seq.).

3. See generally 83 Harvard Law Review 552, 554 et seq.

> quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

Total preemption, however, has yielded to some exceptions which the same court defined in *San Diego Building Trades Council, Etc.* v. *Garmon* (1959), 359 U. S. 236 [79 S. Ct. 773]. In that case the court states the rule to be when an activity is arguably protected under section 7 or arguably prohibited under section 8 of the Act,[4] the state as well as the federal courts must defer to the exclusive primary competence of the National Labor Relations Board,[5] but it carved two notable exceptions into the rule precluding state action. These are (1) where the activity regulated was a merely peripheral concern of the Act, or (2) where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not infer Congress had deprived the states of the power to act. In the former category was subject matter suggested by *International Ass'n of Machinists* v. *Gonzales* (1958), 356 U. S. 617 [78 S. St. 923] which dealt with contractual rights between unions and their members, a matter not really affecting management (but cf. *Amalgamated Ass'n of St., E. R. & M. C. Emp.* v. *Lockridge* (1971), 403 U. S. 274, 292-297 [91 S. Ct. 1909, 1920-1923]). In the second category the *Garmon* court pointed to *International Union, Etc.* v. *Russell* (1958), 356 U. S. 634 [78 S. Ct. 932], dealing with intimidation and threats of violence (see also *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114* (1966), 383 U. S. 53 [86 S. Ct. 657], dealing with malicious defamation during a labor dispute).

4. Section 7 is found in 29 U. S. C. A. section 157 and section 8 is found in 29 U. S. C. A. section 158.

5. *San Diego Building Trades Council, etc.* v. *Garmon* (1959), *supra*, 359 U. S. 236, 245 [79 S. Ct. 773, 779-780].

The United States Supreme Court has not yet accepted a case where it could directly address the narrow question of the states' right to enjoin a trespass as it may be involved in labor disputes. In *Amalgamated Meat Cut., Etc.* v. *Fairlawn Meats* (1957), 353 U. S. 20, 24 [77 S. Ct. 604, 606], the court expressly reserved the question. Since *Fairlawn Meats*, the high courts of Alabama,[6] Illinois,[7] Tennessee,[8] and Wisconsin[9] have decided cases which hold the state does have subject matter jurisdiction in cases of trespass. The Supreme Court specifically refused to grant certiorari in the Illinois case. In the Alabama case certiorari was granted and later dismissed as improvidently granted since "only a bare remnant of the original controversy remains." In that case, however, Chief Justice Burger in a concurring opinion stated:

> "In my view any contention that the States are pre-empted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises. Rather, it has acted against the backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat. 140, 29 U.S.C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area.

6. *Taggart* v. *Weinacker's, Inc.* (1968), 283 Ala. 171 [214 So. 2d 913, 917-918, 921], *cert. denied* (1969), 396 U. S. 813 [90 S. Ct. 52], *cert. dismissed* (1970), 397 U. S. 223 [90 S. Ct. 876].

7. *People* v. *Goduto* (1961), 21 Ill. 2d 605, 608-609 [174 N. E. 2d 385, 387], *cert. den.* (1961), 368 U. S. 927 [82 S. Ct. 361].

8. *Hood* v. *Stafford* (1964), 213 Tenn. 684, 694-695 [378 S. W. 2d 766, 771].

9. *Moreland Corp.* v. *Retail Store Employees Union Local No. 444* (1962), 16 Wis. 2d 499, 503 [114 N. W. 2d 876, 878].

> "Nothing in *San Diego Building Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. *Garmon* left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted in local feeling and responsibility.' (359 U.S., at 243, 244, 79 S.Ct., at 779.) Few concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens." (*Taggart* v. *Weinacker's, Inc.* (1970), *supra*, 397 U. S. 223, 227-228 [90 S. Ct. 876, 878].)

In *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114* (1966), *supra*, 383 U. S. 53 [86 S. Ct. 657], the Supreme Court held the NLRB did not have exclusive jurisdiction in a suit by the employer against the Union for malicious defamation in connection with a labor dispute. The court concluded, "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." (383 U. S. at 62 [86 S. Ct. at 663]; see also *Old Dominion Br. No. 496, Nat. Ass'n. Letter Car.* v. *Austin* (1974), 418 U. S. 264, ... [94 S. Ct. 2770, 2775]. We believe the rule applies equally to trespass.[10] The value of property and one's right to peaceful possession is basic in our state and that value is deeply rooted in local feeling and responsibility (see, e.g., Pen. Code §§ 552 et seq., 602, 602.5, 603 and 647c). While not essential to the application of the *Garmon* rule it is proper to note this action in the state court does not directly infringe on the jurisdiction of the NLRB, for no effort was made to bring the matter within the Board's jurisdiction.[11] The California courts

10. In *Taggart* v. *Weinacker's, Inc.* (1970), *supra*, 397 U. S. 223, 229-231 [90 S. Ct. 876, 879-880], Justice Harlan, however, distinguished *Linn* on the grounds that "malicious libel" is not arguably protected by the Act, and trespass must be put within the purview of the NLRB authority.

11. See Justice Harlan's memorandum opinion in *Taggart* v. *Weinacker's Inc.* (1970), *supra*, 397 U. S. 223, 230 [90 S. Ct. 876,

(Continued on next page)

are not preempted from exercising their general jurisdiction in matters of trespass related to labor disputes.

The Union next contends the First Amendment to the United States Constitution guarantees the right to picket Sears premises. It relies generally on *Amal. Food Emp. U. Loc. 590* v. *Logan Valley Plaza* (1968), 391 U. S. 308, 313 [88 S. Ct. 1601, 1605], and a line of cited cases holding peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of picketing, protected by the First Amendment. The fact that the property upon which the picketing occurs is private does not necessarily preclude asserting the constitutional right of free speech if the property is treated as public property (*Marsh* v. *State of Alabama* (1946), 326 U. S. 501 [66 S. Ct. 276]).[12] In *Logan Valley Plaza* the court held a shopping center complex with numerous tenants and streets and walkways had sufficient characteristics of a public municipal facility to permit picketing directly related in its purpose to the use to which the shopping center property was being put.[13]

(Continued from preceding page)

879], in which the Justice recognizes concern over the hiatus created when the NLRB does not or cannot assert its jurisdiction and the "arguably protected" rule of the *Garmon* case leaves the employer in the position of using self-help or provoking the union to charge the employer with an unfair labor practice (see also Justice White's concurring opinion in *International Longshore, Local 1416* v. *Ariadne Shipping Co.* (1970), 397 U. S. 195, 201-202 [90 S. Ct. 872, 875]. The problem is also discussed in 56 Virginia Law Review 1435, 1437-1438.

12. In *Marsh* v. *State of Alabama* (1946), *supra*, 326 U. S. 501 [66 S. Ct. 276], the Jehovah's Witnesses were allowed to distribute religious literature on the streets of a "company town" because the property, though privately owned by Gulf Shipbuilding Corporation, had all the outward appearances of any other town including streets and walkways open to the public with nothing to distinguish them as private property. The owner also assumed the functions of a municipal government.

13. *In re Lane* (1969), 71 Cal. 2d 872, follows the *Logan Valley Plaza* holding. It was not a labor management dispute with the picketed store but rather the picketer was protecting the store's ad-

(Continued on next page)

After the decision in *Logan Valley Plaza*, however, its apparently broad holding as to the scope of the constitutional right to exercise First and Fourteenth Amendment rights on property generally open to the public has been somewhat limited as it applies to privately-owned property. In *Lloyd Corporation, Ltd.* v. *Tanner* (1972), 407 U. S. 551, 562 [92 S. Ct. 2219, 2225], the court points out that *Logan Valley Plaza* extended the *Marsh* rule to a shopping center complex only in the context where the picketing activity directly related to the shopping center activities "*and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.*" (Emphasis added.) (*Lloyd Corporation, Ltd.* v. *Tanner* (1972), *supra*, 407 U. S. 551, 563 [92 S. Ct. 2219, 2226].) In denying the respondents the right to pass out handbills (not a labor management dispute) the court rejected the argument that since the center is open to the public, the private owner cannot enforce restrictions against handbills on the premises. It stated such an argument misapprehends the scope of the invitation extended to the public which is to come to the center to do business.

On the heels of this decision was *Central Hardware Company* v. *N. L. R. B.* (1972), 407 U. S. 539 [92 S. Ct. 2238], a case which did involve a union dispute. Here the Supreme Court reiterated the limitation on the *Logan Valley Plaza* case, saying:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.

(Continued from preceding page)

vertising in a newspaper engaged in a union dispute. It did, however, involve a single store with parking lot much as is present in Sears case. The court balanced the interests and, finding the public sidewalk hazardous, upheld the right to picket on private property.

> The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." (*Central Hardware Company* v. *N. L. R. B.* (1972), *supra*, 407 U. S. at 547 [92 S. Ct. at 2243].)

The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous[14] and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is

14. The case before us differs substantially from *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, relied on by the Union, in that the picketing on nearby public streets or sidewalks would entail the danger of traffic tie-up confusion as to the object of the picketing, and would impose the requirements of larger signs and more pickets. *Schwartz-Torrance* involved a shopping center complex and the principal target of the picketing was a single store within the complex. The court balanced the respective rights of the private property owner and the Union, and concluded the Union's interest in picketing outweighed a theoretical invasion of the right to exclusive control by the shopping center owner. See also *In re Lane* (1969), *supra*, 71 Cal. 2d 872, 877, where "difficulties and hazards" to those exercising their First Amendment privileges existed (but *cf. Central Hardware Company* v. *N. L. R. B.* (1972), *supra*, 407 U. S. 539, 547 [92 S. Ct. 2238, 2243] and *N. L. R. B.* v. *Babcock & Wilcox Co.* (1956), 351 U. S. 105, 112 [76 S. Ct. 679, 684]).

nothing in the facts presented here to suggest in the balancing of respective interests the interest of the property owner *must* yield to the Union. (See also *Diamond* v. *Bland* (1974), 11 Cal. 3d 331, 334.)

The Union finally contends California law proscribes the issuance of injunctions for Union activity, relying on *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960), 53 Cal. 2d 455, and *Messner* v. *Journeymen Barbers etc. International Union* (1960), 53 Cal. 2d 873. No one disputes the right of the Union to employ picketing reasonably related to lawful objectives but neither of the cases cited involves the issue of Union activity on private property. Nor is Penal Code section 552.1[15] which is applicable only to posted industrial property,[16] a proscription on the issuance of an injunction in this case which involves commercial property used for retail sales.

Judgment affirmed.

Certified for Publication. /s/ COLOGNE

We Concur:

/s/ BROWN
P.J.

/s/ COUGHLIN
J.•

15. Penal Code section 552.1 reads in part as follows:

This article does not prohibit:

"(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof."

16. Article 1 preceding Penal Code section 552.1 is entitled Trespassing or Loitering near Posted Industrial Property, and the property subject of the article is defined in section 554 as including property used in petroleum, gas, electricity, telephone, water, explosive or rail facilities. (See also *Cotton* v. *Superior Court* (1961), 56 Cal. 2d 459, 463.)

• Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

SEARS ROEBUCK AND COMPANY

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Petition for hearing Granted and cause transferred to this court and retransferred to the Court of Appeal, Fourth District, Division One.

/s/ WRIGHT
Chief Justice

/s/ CLARK
Justice

/s/ TOBRINER
Justice

/s/ MOSK
Justice

/s/ SULLIVAN
Justice

/s/ RICHARDSON
Justice

.....
Justice

APPENDIX D

Certified for Publication

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

Division One

State of California

SEARS ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNSEL OF CARPENTERS, *Defendant and Appellant.*	4 Civ. No. 14036 (Sup. Ct. No. 347511)

OPINION

Appeal from a judgment of the Superior Court of San Diego County. Joseph A. Kilgarif, Judge. Affirmed.

Brundage, Williams & Zellmann, and Jerry J. Williams, for Defendant and Appellant.

Gray, Cary, Ames & Frye, and David B. Geerdes, for Plaintiff and Respondent.

Sears Roebuck & Company (Sears) filed a complaint against the San Diego County District Council of Carpenters (Union) for an injunction (continuing trespass), and secured a temporary restraining order. The demurrer to the complaint was overruled and the issue set for hearing as a short cause on November 16, 1973. The preliminary injunction was granted on November 21, 1973, and the Union appeals.

In October 1973 the Union was informed by one of its members that Sears was performing certain carpentry work in the

store located at 555-5th Avenue in Chula Vista. Business agents of the Union visited the store and determined certain platforms and wooden structures were being constructed by persons who had not been dispatched from their hiring halls. The work was that which would be required of a "journeyman carpenter."

The Union agents called upon J. L. Ochoa, the store manager, and asked him to contract the work through a Union contractor or sign a short form agreement realative to use of Union carpenters and at prevailing Union wage scale. Ochoa advised the agents he would look into the matter but never reported back even though they made repeated attempts to reach him.

On the morning of October 26, 1973, the Union began picketing the store, walking back and forth in the parking lot next to the walkways on the north, west and east sides of the building. The pickets were peaceful, did not interfere with traffic and generally conducted their work without violence or threat of violence.

The Sears building is located 220 feet from 5th Avenue, 288 feet from H Street and 490 feet from I Street and is the only business at the location. The building is surrounded with a sidewalk and beyond that a parking area. The entire Sears location is surrounded with a city-owned sidewalk and curb at the street. The general public, of course, has access to the entire area. The restraining order required the pickets to keep off of the Sears-owned property, confining their pickets to the public sidewalk at the curb line of the public streets. After the pickets were moved to the public property Union sympathizers saw the pickets and refused to cross the lines but the Union contends the pickets are, in that position, less effective. Since November 12, 1973, there have been no pickets at the Sears Chula Vista store.

The Union first contends the state courts have no jurisdiction in this sort of labor-management dispute and that both state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board (NLRB).

State regulation of peaceful picketing[1] is subject to two principal limitations: (1) the free speech guaranty of the First Amendment; and (2) preemption of the field of regulation by the National Labor Relations Act (Act).[2] Under the Act the NLRB may issue a cease and desist order or seek injunctive relief if it determines an unfair labor practice has occurred.[3] While neither the Act nor its legislative history provides for a preemption in the field of labor relations, the courts have held the NLRB has primary responsibility for dealing with the problem. In *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.* (1953), 346 U. S. 485, 490-491 [74 S. Ct. 161, 165-166], the United States Supreme Court said:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite

1. See generally Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. R. 1435; Bloomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. R. 552.

2. 29 U. S. C. A. section 151 et seq. The National Labor Relations Act (NLRA) is encompassed in the Labor Management Relations Act (29 U. S. C. A. section 141 et seq.).

3. See generally Bloomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. R. 552, 54 et seq.

> as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

Total preemption, however, has yielded to some exceptions which the same court defined in *San Diego Building Trades Council, etc.* v. *Garmon* (1959), 359 U. S. 236 [79 S. Ct. 773]. In that case the court states the rule to be when an activity is arguably protected under section 7 or arguably prohibited under section 8 of the Act,[4] the state as well as the federal courts must defer to the exclusive primary competence of the NLRB,[5] but it carved two notable exceptions into the rule precluding state action. These are (1) where the activity regulated was a merely peripheral concern of the Act, or (2) where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not infer Congress had deprived the states of the power to act. In the former category was subject matter suggested by *International Ass'n of Machinists* v. *Gonzales* (1958), 356 U. S. 617 [78 S. Ct. 923], which dealt with contractual rights between unions and their members, a matter not really affecting management (but cf. *Amalgamated Ass'n of St., E. R. & M. C. Emp.* v. *Lockridge* (1971), 403 U. S. 274, 292-297 [91 S. Ct. 1909, 1920-1923]). In the second category the *Garmon* court pointed to *International Union, etc.* v. *Russell* (1958), 356 U. S. 634 [78 S. Ct. 932], dealing with intimidation and threats of violence (see also *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114* (1966), 383 U. S. 53 [86 S. Ct. 657], dealing with malicious defamation during a labor dispute).

The United States Supreme Court has not yet accepted a case where it could directly address the narrow question of the states'

4. Section 7 is found in 29 U. S. C. A. section 157 and section 8 is found in 29 U. S. C. A. section 158.

5. *San Diego Building Trades Council, etc.* v. *Garmon, supra,* 359 U. S. 236, 245 [79 S. Ct. 773, 779-780].

right to enjoin a trespass as it may be involved in labor disputes. In *Amalgamated Meat Cut., etc.* v. *Fairlawn Meats* (1957), 353 U. S. 20, 24 [77 S. Ct. 604, 606], the court expressly reserved the question. Since *Fairlawn Meats* the high courts of Alabama,[6] Illinois,[7] Tennessee,[8] and Wisconsin[9] have decided cases which hold the state does have subject matter jurisdiction in cases of trespass. The Supreme Court specifically refused to grant certiorari in the Illinois case. In the Alabama case certiorari was granted and later dismissed as improvidently granted since "only a bare remnant of the original controversy remains." In that case, however, Chief Justice Burger in a concurring opinion stated:

> "In my view any contention that the States are pre-empted in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises. Rather, it has acted against the backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat. 140, 29 U.S.C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area.
>
> "Nothing in *San Diego Building Trades Council, Millmen's Union, Local 2020* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773,

6. *Taggart* v. *Weinacker's Inc.* (1968), 283 Ala. 171 [214 So. 2d 913, 917-918, 921], *cert. granted* (1969), 396 U. S. 813 [90 S. Ct. 52], *cert. dismissed* (1970), 397 U. S. 223 [90 S. Ct. 876].

7. *People* v. *Goduto* (1961), 21 Ill. 2d 605, 608-609 [174 N. E. 2d 385, 387], *cert. den.* (1961), 368 U. S. 927 [82 S. Ct. 361].

8. *Hood* v. *Stafford* (1964), 213 Tenn. 684, 694-695 [378 S. W. 2d 766, 771].

9. *Moreland Corp.* v. *Retail Store Employees Union Local No. 444* (1962), 16 Wis. 2d 499, 503 [114 N. W. 2d 876, 878].

> 3 L.Ed.2d 775 (1959), would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. *Garmon* left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted in local feeling and responsibility.' (359 U.S., at 243, 244, 79 S.Ct., at 779.) Few concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens." (*Taggart* v. *Weinacker's, Inc., supra,* 397 U. S. 223, 227-228 [90 S. Ct. 876, 878].)

In *Linn* v. *United Plant Guard Wkrs. of Amer., Loc. 114, supra,* 383 U. S. 53 [86 S. Ct. 657], the Supreme Court held the NLRB did not have exclusive jurisdiction in a suit by the employer against the union for malicious defamation in connection with a labor dispute. The court concluded, "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon.*" (383 U. S. at 62 [86 S. Ct. at 663]; see also *Old Dominion Br. No. 496, Nat. Ass'n, Letter Car.* v. *Austin* (1974), 418 U. S. 264, ___ [94 S. Ct. 2770, 2775].) We believe the rule applies equally to trespass.[10] The values of real property and one's right to peaceful possession and control over it, though certainly not absolute, are basic in our state and are deeply rooted in local feeling and responsibility (see, e.g., Pen. Code § 602, originally enacted in 1872; Clark & Marshall, Crimes, 6th ed., § 12.42, p. 866). Our courts consistently have provided a forum for the preservation of such values (see *Buxbom* v. *Smith* (1944), 23 Cal. 2d 535, 546; and see 2 Witkin, Cal. Proc. (2d ed. 1970), Provisional Remedies, §§ 57 and 62, pp. 1502, 1505; 3 Witkin, Cal. Proc. (2d ed. 1971), Pleading, §§ 685 and 687, pp. 2309-2312; 4 Witkin, Summary of Calif. Law (8th ed. 1974), Torts, §§ 439-444, pp. 2705-2710).

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10. In *Taggart* v. *Weinacker's Inc., supra,* 397 U. S. 223, 229-231 [90 S. Ct. 876, 879-880], Justice Harlan, however, distinguished *Linn* on the grounds that "malicious libel" is not arguably protected by the Act, and trespass must be put within the purview of the NLRB authority.

In *Central Hardware Company* v. *N. L. R. B.* (1972), 407 U. S. 539 [92 S. Ct. 2238], the United States Supreme Court considered a case involving a private property owner's exercise of traditional possessory interest rights through resort to trespass law and the simultaneous exercise of union organizational rights protected under section 7 of the Act on the landowner's property open to the public. The landowner was beginning operation of two retail stores each surrounded on three sides by a parking lot, essentially the same as the Sears store involved here. The union sought to organize the stores' clerks by means of soliciting in the stores' parking lots which were maintained solely for use by customers and employees. Police arrested a union field organizer after he persistently refused the store manager's request to leave. Then, through an unfair labor practices complaint, the union obtained an order from the NLRB preventing the stores' management from enforcing any rule prohibiting union organizers from using the parking lots to solicit employees on behalf of the union. The NLRB order necessarily included within its scope the use of arrest under any trespass law to keep the union organizers off of the property. The Court of Appeals affirmed the NLRB order. The Supreme Court considered the problem of accommodation between traditional concepts of private property and union organization rights under section 7 of the Act. The court gave effect to the property owner's right of control over his property through enforcement of trespass laws when it concluded the fact the property is open to the general public alone is not enough to permit the exercise of rights under section 7 of the Act on the property. Instead, the court noted it had earlier held property rights need yield "only in the context of an organization campaign" and then only to the extent necessary to facilitate the exercise of employees' section 7 rights (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 544-545 [92 S. Ct. 2238, 2242]). The court held it was error for the NLRB and Court

of Appeals to allow the picketing on the owner's property simply because it was open to the public, etc., before the property had to some significant degree the functional attributes of property devoted to public use, private owner's rights prevail (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 547 [92 S. Ct. 2238, 2243]). The court remanded the matter for a determination whether there was substantial evidence to support the NLRB examiner's conclusion no reasonable means of communication with employees was available to the nonemployee union organizers other than solicitation in the privately owned shopping area's parking lot.

While the *Central Hardware* case did not deal with the specific question of state intrusion upon NLRB jurisdiction as we do here it nevertheless recognized protected activities under the Act can be effectively carried out and not thwarted while at the same time protecting property owner's rights guaranteed by the Fifth and Fourteenth Amendments. From the fact an accommodation was reached between private property owner's rights—allowing use of available law of trespass to protect their interest—and union's rights—permitting them a reasonable means of communication—its decision must be viewed as protecting deeply rooted rights of property owners without interfering with the primary competence of the NLRB. The *Central Hardware* decision aids us in resolving the question whether traditional protective actions by states on behalf of real property owner's interests are infringements on the primary competence of the NLRB in matters actually or arguably protected or prohibited under the Act. A principle reasonably to be taken from *Central Hardware* is that so long as the preservation of the traditional concepts of rights inherent in property ownership do not interfere with or alter the effective communication by the union of its point of view, the property owner's rights in his property should be preserved.

This view finds further support in *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza* (1968), 391 U. S. 308 [88 S. Ct.

1601] which involved actual use of a state court injunction to protect private ownership by moving the location of union picketers asserting union rights against one of several business establishments to a location outside of the shopping center. The court did not base its decision invalidating the injunction on the ground the state injunctive process invaded NLRB jurisdiction. It said, however, had the state court relied on the purpose of the picketing and held it to be illegal, substantial questions of preemption under the federal labor laws would have been present (391 U. S. at p. 314, fn. 7 [88 S. Ct. at p. 1606, fn. 7]). Rather, it focused on the location of the picketers, not their purpose in terms of arguably protected or prohibited activities under the Act. It held the state could not use its trespass laws wholly to exclude from the shopping center members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put (391 U. S. at pp. 319-320 [88 S. Ct. at p. 1609]). The court's emphasis was on the ability of the picketers to communicate their ideas to their intended audience, not on any absence of state power to issue the injunction. Indeed, it framed the issue presented in terms of the state's "generally valid rules against trespass to private property." (*Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 315 [88 S. Ct. 1601, 1607]). The case before us, like *Logan Valley Plaza,* concerns itself only with the location and not with the purpose of the picketing.

Where the issues of the labor dispute are not affected, and the ground rules between labor and management are not altered, the state courts are the most appropriate agency to enforce these traditional rights (see *Buxbom* v. *Smith, supra,* 23 Cal. 2d 535, 546). This is particularly so if NLRB jurisdiction has not been requested or assumed.

Our attention has been called to the California Supreme Court case of *Musicians Union, Local No. 6* v. *Superior Court*

(1968), 69 Cal. 2d 695. Decided before *Central Hardware* the court there considered a lower court injunction broadly stated to prohibit all picketing at the entrances or any portion of a publicly owned coliseum for any purpose related to the hiring of union musicians by a tenant. The injunctive order was held to be beyond the jurisdiction of the superior court under the *Garmon* rule relating to union activities which are arguably protected by the Act and the rule of *Russell* v. *Electrical Workers Local 569* (1966), 64 Cal. 2d 22, 23, 28-29.[11] The court also concluded the injunction could not be justified as an exercise of the power reserved to the states to ensure public health and safety. In connection with the latter point the court said: ". . . it is clear that a blanket application of the states' trespass laws to prohibit such picketing 'would tend to frustrate uniform application of federal labor legislation' . . . [t]he law of trespass . . . cannot frustrate the federal scheme." (*Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 695, 711, 712.) The court then said:

> "There may be circumstances in which the use of trespass laws in labor controversies would reach activities that would have 'no relevance to the Board's function,' and the state's power to enjoin them would not interfere with the Board's jurisdiction over the merits of the labor controversy.' (*Linn* v. *Plant Guard Workers* (1966), 383 U.S. 53, 63-64 [15 L.Ed.2d 582, 590-591, 86 S.Ct. 657].) *In the present case, however, the injunction relies upon the law of trespass* not to ensure public safety and order, but *to institute ground rules governing the economic struggle* between the union and real parties in interest. *It does not prohibit trespassing in specified times and places to guarantee the orderly exhibition of the game.* Thus the injunction protects not the public welfare, but the private right of Coliseum to post its property against

11. The tenant (party against whom the union claimed a grievance) and the coliseum management had failed to demonstrate the NLRB in its discretion would decline to assert jurisdiction. The *Russell* case requires the party seeking relief in the state court to show NLRB would decline to assert jurisdiction.

> any designated entrant thereon. It is for the Board, however, to determine whether and how to protect a party against activities that the Act 'arguably' protects or prohibits. Indeed, the propriety of labor activity on private property has been a persistent issue in disputes before the Board (See Note, *supra,* 73 Harv.L.Rev. 1216, 1218), and the Board has the power in appropriate cases to authorize such activity. (See *Marshall Field & Co.* v. *N.L.R.B., supra,* 200 F.2d 375, 380; *N.L.R.B.* v. *Babcock & Wilcox Co., supra,* 351 U.S. 105, 111-112 [100 L.Ed. 975, 982-983].) Consequently it is manifest that *petitioners' trespass upon Coliseum's property does not justify respondent court's exercise of its jurisdiction to prohibit peaceful activities 'arguably' protected or prohibited by federal law. . . .*" (Emphasis added.) (*Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 695, 712.)

Significant is the opening sentence where the court indicated an injunction would be appropriate if the activities enjoined "had no relevance to the Board's function" and the "injunction would not interfere with the Board's jurisdiction over the merits of the labor controversy." The broad nature of the injunction there, totally prohibiting picketing, made a significant invasion into NLRB authority and the labor issues and exceeded the jurisdiction of the state court.

The *Musicians Union, Local No. 6* case makes the issue abundantly clear by way of contrast. In the case at bar the injunction is carefully worded to avoid interfering with the labor issues and preserve the forces the respective parties may bring to bear. It simply moves the situs of the controversy off the private property. It did not interfere with the ability of the parties to carry on the controversy with or without NLRB involvement. The trial court's order was narrowly confined to the "location" of the controversy as opposed to the purpose of the acts (see *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 313, 314 [88 S. Ct. 1601, 1606]) and did not deny the Union effective communication with all persons going to Sears.

Under *Central Hardware*, with its recognition an accommodation is necessary between the exercise of private property and protected union activity rights, it seems apparent the United States Supreme Court does not view the making of an appropriate accommodation as a frustration of the federal scheme under the Act. No doubt the United States Supreme Court would agree, as we do, blanket application of trespass law as the lower court applied in the *Musicians Union, Local No. 6* case would tend to frustrate the federal scheme by impairing the primary competence of the NLRB. In the *Central Hardware* case, moreover, the United States Supreme Court has, as the State Supreme Court did in the *Musicians Union, Local No. 6* case, evidenced the view that circumstances may present themselves in which the use of trespass laws in labor controversies reaches activities having no relevance to the functions of NLRB and an exercise of state power to enjoin these activities would not interfere with NLRB jurisdiction over the merits of the labor controversy or the rights of the parties in asserting their respective economic pressure against the adversary. This is the case before us, for an appropriate accommodation has been made to assure effective communication of labor's view while at the same time protecting traditional rights of private property owners. Unlike the *Musicians Union, Local No. 6* case, the injunction here does not establish different ground rules which have any governing effect on the economic struggle between employer and Union; it is limited in scope only moving the arena of the controversy to the public property; in no way can it be viewed as an exercise of jurisdiction "to *prohibit* peaceful activities 'arguably' protected or prohibited by federal law." (Emphasis added.) *Musicians Union, Local No. 6* v. *Superior Court, supra,* 69 Cal. 2d 965, 712.)

While not essential to the application of the *Garmon* rule it is appropriate to note no effort was made to bring the matter within the Board's jurisdiction.[12]

12. See Justice Harlan's memorandum opinion in *Taggart* v. *Weinacker's Inc., supra,* 397 U. S. 223, 230 [90 S. Ct. 876, 879],

(Continued on next page)

The Union next contends the First Amendment to the United States Constitution guarantees the right to picket Sears' premises. It relies generally on *Amal. Food Emp. U. Loc. 590* v. *Logan Val. Plaza, supra,* 391 U. S. 308, 313 [88 S. Ct. 1601, 1605], and a line of cited cases holding peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of picketing, protected by the First Amendment. The fact that the property upon which the picketing occurs is private does not necessarily preclude asserting the constitutional right of free speech if the property is treated as public property (*Marsh* v. *State of Alabama* (1946), 326 U. S. 501 [66 S. Ct. 276]).[13] In *Logan Valley Plaza* the court held a shopping center complex with numerous tenants and streets and walkways had sufficient characteristics of a public municipal facility to permit picketing directly related in its purpose to the use to which the shopping center property was being put.[14]

(Continued from preceding page)

in which the Justice recognizes concern over the hiatus created when the NLRB does not or cannot assert its jurisdiction and the "arguably protected" rule of the *Garmon* case leaves the employer in the position of using self-help or provoking the union to charge the employer with an unfair labor practice (see also Justice White's concurring opinion in *International Longshore, Local 1416* v. *Ariadne Shipping Co.* (1970), 397 U. S. 195, 201-202 [90 S. Ct. 872, 875]. The problem is also discussed in Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon,* 56 Va. L. R. 1435, 1437-1438.

13. In *Marsh* v. *State of Alabama, supra,* 326 U. S. 501 [66 S. Ct. 276], the Jehovah's Witnesses were allowed to distribute religious literature on the streets of a "company town" because the property, though privately owned by Gulf Shipbuilding Corporation, had all the outward appearances of any other town including streets and walkways open to the public with nothing to distinguish them as private property. The owner also assumed the functions of a municipal government.

14. *In re Lane* (1969), 71 Cal. 2d 872, follows the *Logan Valley Plaza* holding. It was not a labor management dispute with the picketed store but rather the picketers were protesting the store's advertising in a newspaper engaged in a union dispute. It did, however, involve a single store with parking lot much as is present in Sears' case. The Court balanced the interests and, finding the public sidewalk hazardous, upheld the right to picket on private property.

After the decision in *Logan Valley Plaza*, however, its apparently broad holding as to the scope of the constitutional right to exercise First and Fourteenth Amendment rights on property generally open to the public has been somewhat limited as it applies to privately-owned property. In *Lloyd Corporation, Ltd.* v. *Tanner* (1972), 407 U. S. 551, 562 [92 S. Ct. 2219, 2225], the court points out that *Logan Valley Plaza* extended the *Marsh* rule to a shopping center complex only in the context where the picketing activity directly related to the shopping center activities *"and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available."* (Emphasis added.) (*Lloyd Corporation, Ltd.* v. *Tanner, supra,* 407 U. S. 551, 563 [92 S. Ct. 2219, 2226].) In denying the respondents the right to pass out handbills (not a labor management dispute) the court rejected the argument that since the center is open to the public, the private owner cannot enforce restrictions against handbills on the premises. It stated such an argument misapprehends the scope of the invitation extended to the public which is to come to the center to do business.

On the heels of this decision was *Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539 [92 S. Ct. 2238], a case which did involve a union dispute. Here the Supreme Court reiterated the limitation on the *Logan Valley Plaza* case, saying:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes. The only fact relied upon for the argument that Central's parking lots have acquired the characteristics of a public municipal facility is that they are 'open to the public.' Such an argument could be made with respect to almost every

> retail and service establishment in the country, regardless of size or location. To accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." (*Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. at 547 [92 S. Ct. at 2243].)

The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately-operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous[15] and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is nothing in the facts presented here to suggest in the balancing of respective interests the property owner *must* yield to the Union. (See also *Diamond* v. *Bland* (1974), 11 Cal. 3d 331, 334.)

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15. The case before us differs substantially from *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union* (1964), 61 Cal. 2d 766, relied on by the Union, in that the picketing on nearby public streets or sidewalks would entail the danger of traffic tie-up confusion as to the object of the picketing, and would impose the requirements of larger signs and more pickets. *Schwartz-Torrance* involved a shopping center complex and the principal target of the picketing was a single store within the complex. The court balanced the respective rights of the private property owner and the union, and concluded the union's interest in picketing outweighed a theoretical invasion of the right to exclusive control by the shopping center owner. See also *In re Lane, supra,* 71 Cal. 2d 872, 877, where "difficulties and hazards" to those exercising their First Amendment privileges existed (but *cf. Central Hardware Company* v. *N. L. R. B., supra,* 407 U. S. 539, 547 [92 S. Ct. 2238, 2243] and *N. L. R. B.* v. *Babcock & Wilcox Co.* (1956), 351 U. S. 105, 112 [76 S. Ct. 679, 684]).

The Union finally contends California law proscribes the issuance of injunctions for Union activity, relying on *Petri Cleaners, Inc.* v. *Automotive Employees, etc., Local No. 88* (1960), 53 Cal. 2d 455, and *Messner* v. *Journeymen Barbers etc. International Union* (1960), 53 Cal. 2d 873. No one disputes the right of the Union to employ picketing reasonably related to lawful objectives but neither of the cases cited involves the issue of Union activity on private property. Nor is Penal Code section 552.1[16] which is applicable only to posted industrial property,[17] a proscription on the issuance of an injunction in this case which involves commercial property used for retail sales.

Judgment affirmed.

Certified for Publication. /s/ COLOGNE *J.*

We Concur:

/s/ AULT
Acting P. J.

/s/ COUGHLIN
*J.**

16. Penal Code section 552.1 reads in part as follows:

"This article does not prohibit:

"(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof.

". . . ."

17. Article 1 preceding Penal Code section552.1 is entitled Trespassing or Loitering near Posted Industrial Property, and the property subject of the article is defined in section 554 as including property used in petroleum, gas, electricity, telephone, water, explosive or rail facilities. (See also *Cotton* v. *Superior Court* (1961), 56 Cal. 2d 459, 463.)

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SEARS ROEBUCK & COMPANY, *Plaintiff and Respondent,* *vs.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Defendant and Appellant.*	L. A. 30562 Super. Ct. No. 347511

Defendant San Diego County District Council of Carpenters (Union) appeals from an order granting a preliminary injunction restraining defendant, its officers, agents, representatives and members from picketing on the property of plaintiff Sears, Roebuck & Company (Sears), but permitting them to picket on the public sidewalks adjacent to Sears' private property.

Sears operates a retail department store on property which it owns in Chula Vista, San Diego County. The store building itself is centered on the large, rectangular-shaped piece of land. Walkways abut on the building on all four sides; these in turn are surrounded by a large parking area. All of the walkways and the entire parking area are located on Sears property which on its external limits is bounded on three sides by public sidewalks and streets, and on the fourth by private residences separated from the store property by a concrete wall. Sears' store is the only building on the premises.

Defendant Union is a labor organization created for the purpose of negotiating terms and conditions of employment on behalf of certain employees in the carpentry trades.

In October 1973, the Union was informed by one of its members that Sears was having carpentry work done in its

Chula Vista store. On October 24 two business representatives of the Union visited the store and determined that platforms and other wooden structures were being built by carpenters who had not been dispatched from the Union's hiring hall, that the work was covered by the master agreement between the Union and the Building Trades Council of San Diego County and that the men engaged in it came within the classification of journeymen carpenters. Later the same day representatives of the Union met with Sears' store manager and requested that Sears either contract the work through a building trades contractor who would use dispatched carpenters, or in the alternative, sign a short form agreement obligating Sears to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters on the job. The manager indicated that he would consider the matter, but despite repeated inquiries by the Union, he never responded.

On the morning of October 26, the Union established picket lines on plaintiff's property. Pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the "Carpenters' Trade Union." It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic. The security manager of the store requested that the pickets be removed from Sears' private property, but the Union's business representative refused, stating that the pickets would not leave unless compelled to do so by legal action.

On October 29, Sears obtained a temporary restraining order enjoining the Union, its agents, representatives and members from picketing on Sears' property. The Union complied by removing its pickets to the public sidewalks adjacent to, but outside of, the property. Sears claimed that while the Union was picketing on the public sidewalks, certain deliverymen and repairmen

refused to cross the picket-lines to service the Sears store. The Union, on the other hand, asserted that its pickets on the public sidewalks were ineffective because they were too far away from the store. As a result, on November 12, 1973, the Union moved its pickets allegedly because of their ineffectiveness. The pickets never returned.

On November 21, 1973, the superior court granted a preliminary injunction restraining the Union, its officers, agents, representatives and members from "causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property. . . ." The court expressly declared, however, that "this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, 'H' Street and 'I' Street which are adjacent to the private property of plaintiff." This appeal followed.

Although the Union launches several related attacks on the trial court's injunction, essentially its main contention is that the court did not have the subject matter jurisdiction of the underlying labor dispute and thus was devoid of all judicial power to enjoin the picketing. We are satisfied that this contention has merit. We shall point out that federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board (Board) and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property. Accordingly we reverse the order granting the injunction.

As we have already had occasion to explain in detail (see Musicians Union, Local No. 6 v. Superior Court (1968), 69 Cal. 2d 695) the Labor Management Relations Act (Act), whose purpose is "to promote the full flow of commerce . . . and to protect the rights of the public in connection with labor disputes affecting commerce," (29 U. S. C. A. § 141) empowers the Board "to prevent any person from engaging in any unfair

labor practice . . . affecting commerce." (29 U. S. C. A. § 160(a).) "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." (29 U. S. C. A. § 152(9).) "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States. . . ." (29 U. S. C. A. § 152(6).) "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (29 U. S. C. A. § 152(7).) In the matter before us, we observe that the parties do not call into question the fact that the underlying controversy is a labor dispute "affecting commerce" and thus within the compass of the foregoing statutory definitions establishing the jurisdiction of the Board. Nor does Sears contend that the Board in its discretion would decline to assert jurisdiction over the dispute and that as a result the superior court had jurisdiction pursuant to the provisions of section 14(c) of the Act. (29 U. S. C. A. § 164(c).)[1]

Having satisfied ourselves that Sears was a statutory employer subject to the Act, we turn to consider the two sections having a crucial impact on the jurisdictional issue before us.

1. Defendant Union, relying upon our decision in *Russell* v. *Electrical Worker Local 569* (1966), 64 Cal. 2d 22, argues that Sears' failure to demonstrate that the Board would decline to assert jurisdiction over this dispute precludes the assumption of jurisdiction by the superior court. The Union misconstrues *Russell*. Under that decision, the party seeking relief in the superior court bears the burden of establishing the Board's refusal to assert jurisdiction only in those instances where it is claimed that the state court has jurisdiction pursuant to the grant of residual jurisdiction in section 14 (c) of the Act. As will be explained, *infra*, Sears contends that notwithstanding the Board's jurisdiction, the superior court had jurisdiction to issue its injunction by virtue of a judicially created exception to the rule of preemption; Sears does not claim the benefit of the statutory exception in section 14(c).

Section 7 of the Act provides that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." (29 U. S. C. A. § 157.) Section 8 defines activities which constitute unfair labor practices. (29 U. S. C. A. § 158.) It is now settled law that "When an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted." (San Diego Bldg. Trades Council v. Garmon (1959) 359 U. S. 236, 245; see Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 706.) *Garmon* "established the general principle that the [Act] pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." (Motor Coach Employees v. Lockridge (1971) 403 U. S. 274, 276.) We therefore proceed to determine whether the activities enjoined in the instant case are "arguably" protected by section 7 or "arguably" prohibited by section 8 of the Act.[2]

As the uncontradicted facts before us disclose, the Union, prior to instituting picketing, requested that Sears contract its work through a building trades contractor who would employ carpenters dispatched from Union's hiring hall or, in the alternative, sign an agreement with the Union by which Sears would be bound to hire through the Union's hiring hall at prevailing wage scales. These facts indicate that one of the Union's purposes in picketing the Sears store was to secure work for the Union's members. We have heretofore recognized that a labor union "seeking to broaden the employment opportunities for its members . . . pursue[s] an objective that section 7 'arguably' protects as an activity for the employees' 'mutual aid or protection.' . . .

2. In so doing, we are mindful of our earlier views to the effect that the adverb "arguably" as used in the above excerpt from *Carmon* means "susceptible of reasonable" argument. (See Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 584; see also Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 706, fn. 6.)

[¶] Moreover, picketing for employees' 'mutual aid or protection' is a classic form of 'concerted activities' within the meaning of section 7." (Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 707.) The record also reflects that the picketing was for the purpose of publicizing Sears' undercutting of prevailing standards for the employment of carpenters. In this additional respect, then, the Union's "peaceful primary picketing to protest wage rates below established area standards arguably constituted protected activity under [section] 7." (Longshoremen Local 1416 v. Ariadne Shipping Co. (1970) 397 U. S. 195, 200-201.)

These picketing activities of the Union were not disqualified for arguable protection under section 7 merely because they were engaged in upon Sears' private property and, being without Sears' permission or approval, were consequently of a trespassory nature. In NLRB v. Babcock & Wilcox Co. (1956) 351 U. S. 105, and Central Hardware Co. v. NLRB (1972) 407 U. S. 539, the Supreme Court established that in certain circumstances non-employee union representatives have a right protected under section 7 to enter the employer's premises. Undeniably this right is not all encompassing. A determination of its scope requires an "[a]ccommodation between [section 7 rights and private property rights] with as little destruction of one as is consistent with the maintenance of the other." (NLRB v. Babcock & Wilcox Co., *supra*, 351 U. S. at p. 112.) "The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." (Hudgens v. NLRB (1976) ..... U. S. .....*) Under the *Garmon* rule, so long as it can be argued that trespassory union activity is protected under section 7, it is initially within the exclusive competence of the Board to reconcile these section 7 rights with private property rights; state court jurisdiction is displaced. (See Cox, *Labor Law Preemption Revisited* (1972) 85 Harv. L. Rev.

* 44 U. S. L. Week 4281, 4286.

1337, 1360-1361; Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity* (1970) 83 Harv. L. Rev. 552, 562-563.)[3]

We also consider it "arguable" that the Union's activities constituted recognitional picketing subject to the provisions of section 8(b)(7)(C) of the Act: "(b) It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees: . . . (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing; . . . *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." (29 U. S. C. A. § 158(b)(7)(C).)

3. The necessity for the NLRB to be the arbiter of whether concerted trespassory union activity is protected by section 7 was cogently explained by an assistant general counsel of the Board: "This is an area that clearly calls for the exercise of the Board's expertise and experience, requiring it to consider and weigh such factors as whether employees or outside organizers are involved; if the latter, the extent to which the property has been opened up to outsiders for purposes other than union organization; and the feasibility of utilizing other avenues of communication. To permit the state courts to make determinations of this delicate nature is likely to result in the state court finding unprotected, and then enjoining, activity that the Board would find was protected by section 7 of the [Act.] To invite such conflicts with respect to 'conduct so plainly within the central aims of federal regulation' can only result in impairing Congress' intention to obtain a uniform national labor policy." (Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon* (1970) 56 Va. L. Rev. 1435, 1443-1444; fns. omitted.)

The request by Union's business representative that Sears sign a short form agreement arguably indicates that a recognitional purpose underlay the picketing and belies a claim that the picketing was not subject to section 8(b)(7)(C) because it was solely for the purpose of publicizing that Sears was undercutting prevailing wage rates for the employment of carpenters. (See Yuba, Sutter & Colusa Counties Bldg. & Construction Trades Council (1971) 189 N. L. R. B. 450 [77 L. R. R. M. 1185]; Building & Construction Trades Council of Philadelphia (1964) 149 N. L. R. B. 1629 [58 L. R. R. M. 1001]; Plasterers' & Cement Masons' Local 44 (1963) 144 N. L. R. B. 1298 [54 L. R. R. M. 1237]; Painters Union, Local 130 (1962) 135 N. L. R. B. 876 [49 L. R. R. M. 1592]; see also generally Morris, The Developing Labor Law (1971) pp. 564-566, 568-573.) This recognitional objective brought Union's picketing within the ambit of the 30-day limitation in section 8(b)(7)(C) notwithstanding the facts that Sears had no employees whom Union sought to represent and that therefore a petition for representation election under section 9(c) would have been futile. (Samoff v. Building & Construction Council of Delaware (1974) 378 F. Supp. 261, 267; Local 542, Int'l Union of Oper. Engineers (1963) 142 N. L. R. B. 1132 [53 L. R. R. M. 1205], enforced *sub nom.* NLRB v. Local 542, Int'l Union of Oper. Engineers (3rd Cir. 1964) 331 F. 2d 99, cert. den. 379 U. S. 889.) As the Board declared in *Local 542:* "The primary purpose of Section 8(b)(7) is to limit the impact of recognitional or organizational picketing upon an employer or his employees, so that questions of representation may be settled by orderly processes and in accord with the free choice of employees. In our view, a holding here that a union can picket indefinitely to force an employer to sign a *prehire* contract would run contrary to the purposes of the section." (142 N. L. R. B. 1132; italics in original.) The Union was arguably not entitled to the benefit of the informational picketing proviso since it appears that the picketing had the effect of inducing "individual[s] employed by . . . other person[s] in the

course of [their] employment, not to pick up, deliver or transport any goods or not to perform any services." (29 U. S. C. A. § 158(b)(7)(C).)

Thus, had the picketing continued for 30 days without a petition for a representation election having been filed, Union would have arguably violated section 8(b)(7)(C). In addition to its remedy of bringing an unfair labor practice charge before the Board, Sears might also have been entitled to injunctive relief from a United States district court pursuant to section 10(*l*) of the Act. (29 U. S. C. A. § 160 (*l*); see *Samoff v. Building & Construction Council of Delaware, supra,* 378 F. Supp. 261, 265-266.)

In sum, our determination that the activities at issue herein are both arguably protected by section 7 and arguably prohibited by section 8 establishes a case for federal preemption. The Supreme Court has recognized, however, certain exceptions to the *Garmon* rule: "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Assn. of Machinists v. Gonzales [1958], 356 U. S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[2]" (San Diego Bldg. Trades Council v. Carmon, *supra,* 359 U. S. 236, 243-244.)[4] Sears contends that

"2. United Automobile Workers v. Russell [1958] 356 U. S. 634; Youngdahl v. Rainfair [1957] 355 U. S. 131; Auto Workers v. Wisconsin Board [1956] 351 U. S. 266; United Construction Workers v. Laburnum Corp. [1954] 347 U. S. 656."

4. In addition to the two judicial exceptions to preemption suggested in *Garmon* for matters of "peripheral concern" of the Act or for interests "deeply rooted in local feeling and responsibility,"

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the protection of private property from trespass is an interest "so deeply rooted in local feeling and responsibility" that the states may enjoin peaceful primary labor picketing.

The Supreme Court left open this question in Amalgamated Meat Cutters etc. Workmen v. Fairlawn Meats (1957), 353 U. S. 20,[5] and despite several opportunities (see Schwartz-

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there are statutory exceptions permitting a state court to exercise jurisdiction over activities arguably subject to section 7 or section 8 of the Act. We have referred above to section 14(c) of the Act (see fn. 1, *ante*, and accompanying text) which permits state courts to assume and assert jurisdiction over labor disputes where the NLRB has declined to assert jurisdiction by rule of decision or published rule because, in its opinion, "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . ." 29 U. S. C. A. § 164(c).) In addition, under section 301(a) of the Act (29 U. S. C. A. § 185(a)) "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States. . . ." State courts have concurrent jurisdiction with the federal courts over suits brought under section 301 (a). (Charles Dowd Box Co. v. Courtney (1962) 368 U. S. 502.) Furthermore, a state court is not deprived of its jurisdiction over such a suit by the fact that the conduct complained of would constitute an unfair labor practice within the jurisdiction of the NLRB. (Smith v. Evening News Assn. (1962) 371 U. S. 195; Consolidated Theatres, Inc. v. Theatrical State Employees Union (1968), 69 Cal. 2d 713, 722.) Sears has not claimed that either of these statutory exceptions to NLRB preemption are applicable to the instant controversy.

5. We disagree with Sears' suggestion in its citation to this court of a recent decision of the New York Court of Appeals that the Supreme Court in *Fairlawn Meats* indicated that an injunction directed narrowly at trespassory conduct would not be preempted. (See People v. Bush (N.Y. Ct. App. Dock. No. 138, May 4, 1976) ..... N.Y. .....*) In *Fairlawn Meats* the Supreme Court overturned a state court injunction which prohibited various types of picketing for the purpose of compelling an employer to enter into a union-shop agreement. The Court determined that such picketing was "arguably" prohibited by section 8 (b)(2), and state jurisdiction to regulate such conduct was therefore preempted. One of the types of activity prohibited by the state injunction was trespassing

* Multilith opinion at page 7.

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Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal. 2d 766, cert. den. (1965) 380 U. S. 906; Taggart v. Weinacker's Inc. (1968) 283 Ala. 171, cert. granted (1969) 396 U. S. 813, cert. dism. (1970) 397 U. S. 223) has not yet explicitly answered it. This court, on the other hand, squarely confronted the issue in Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695. In the action underlying that proceeding for a writ of prohibition, the respondent superior court had enjoined the Musicians Union and others from picketing at the entrances to, or on any property of, the Oakland-Alameda County Coliseum Complex. The union was involved in a dispute with Charles O. Finley & Company, Inc., owner of the Oakland Athletics baseball team, over the number and type of musicians who would play at Athletics' home games. We held that the superior court was without jurisdiction to enjoin the union's "arguably" protected or prohibited activities. Noting that "a blanket application of the states' trespass laws to prohibit [peaceful picketing that the Act regulates] 'would tend to frustrate uniform application of federal labor legislation,' " (*id.* at p. 711; citations omitted) we rejected the contention that the court had jurisdiction to enjoin the union from trespassing upon the Coliseum property in the absence of some danger to public health or safety.

It is argued that our decision in *Musicians Union* should be distinguished from the instant case on the basis that in the former the superior court enjoined all picketing wherever it

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upon the plaintiff's property. In that regard, the Supreme Court stated: "Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous premise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." (353 U. S. at pp. 24-25.) We have previously construed this language as leaving open the question which we decide today. (Musicians Union, Local No. 6 v. Superior Court, *supra*, 69 Cal. 2d 695, 711.)

might occur, while the injunction in this case prohibits only picketing upon Sears' private property. This argument clearly lacks merit. As indicated, we held in *Musicians Union* that the superior court was without jurisdiction to enjoin activities, both trespassory and non-trespassory, which were arguably protected or prohibited by the Act.

We recognize in *Musicians Union* that "[t]here may be circumstances in which the use of trespass laws in labor controversies would reach activities that would have 'no relevance to the Board's function,' and the state's power to enjoin them 'would not interfere with the Board's jurisdiction over the merits of the labor controversy.' " (69 Cal. 2d 695, 712, quoting from Linn v. Plant Guard Workers (1966), 383 U. S. 53, 63-64.) We also acknowledged that despite the *Garmon* rule, power was reserved to the states to prevent mass picketing, violence, threats of violence and obstructions to ingress and egress which threatened public health and safety. (69 Cal. 2d at p. 710.) In fact, the cases cited by the Supreme Court in support of its statement in *Garmon* that the states may regulate conduct which touches interests "deeply rooted in local feeling and responsibility" involved instances of mass picketing and threats of violence. (See text accompanying fn. 4, *ante*, and cases cited therein.) Nonetheless, the injunction issued in *Musicians Union* "relie[d] upon the law of trespass not to ensure public safety and order, but to institute ground rules governing the economic struggle between the union and [the employer]. It [did] not prohibit trespassing in specified times and places to guarantee the orderly exhibition of the game. Thus the injunction protect[ed] not the public welfare, but the private right of [the property owner] to post its property against any designated entrant thereon. It is for the Board, however, to determine whether and how to protect a party against activities that the Act 'arguably' protects or prohibits." (69 Cal. 2d at p. 712.) Similarly, the instant case involves no public health or safety consideration which would bring it within the heretofore recognized exceptions to federal preemption.

Notwithstanding our definitive holding in *Musicians Union* that labor picketing arguably subject to section 7 or 8 of the Act may not be enjoined by our courts merely for the reason that it constitutes a trespass on private property, Sears urges that we should be persuaded to the contrary by the concurring opinion of Chief Justice Burger in the subsequent case of Taggart v. Weinacker's Inc., *supra*, 283 Ala. 171, cert. granted 396 U. S. 813, cert. dism. 397 U. S. 223, 227 (Berger, C. J. concurring). In *Taggart* the Supreme Court dismissed its writ of certiorari as improvidently granted[6] after the Supreme Court of Alabama had held that its courts have jurisdiction to enjoin peaceful picketing on private property. While concurring in the court's dismissal, Chief Justice Burger expressed his view that the states are not preempted from enjoining trespassory peaceful picketing. He stated that "[t]he protection of private property . . . through trespass laws is historically a concern of state law" (*id.* at p. 227) and suggested that trespassory conduct touches interests "deeply rooted in local feeling and responsibility." In reaching this conclusion, Chief Justice Burger was particularly concerned with the hiatus in the law resulting from federal preemption where trespassory conduct is not prohibited by section 8 and is only "arguably" protected by section 7. In such instance the landowner has no remedy except to provoke the union into bringing unfair labor practice charges before the Board in order to obtain a determination whether the activity is actually protected. In Chief Justice Burger's view, "[n]othing in [*Garmon*] would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing." (*Id.* at p. 228.)

6. In its per curiam opinion, the court indicated that its dismissal was based on several factors. First, it appeared that only "a bare remnant of the original controversy" remained. Second, the record disclosed that the private sidewalk upon which picketing had occurred was narrow and the Alabama court had found obstructions to customers. The obscurity of the record on these latter issues rendered the case an inappropriate vehicle for deciding the First Amendment questions raised therein.

Nevertheless, in this area of federal preemption we are bound to follow the Supreme Court's most recent ruling. As we have indicated, the holding in *Garman* precludes state court jurisdiction over the labor dispute now before us. Notwithstanding the views of individual members of the high court, the fact remains that the court itself, speaking through a majority of its members, has not to this date created a judicial exception to its *Garmon* ruling so as to except from it and thus withdraw from the exclusive jurisdiction of the Board those peaceful activities—like the activities now engaging our attention—which, although arguably subject to section 7 or section 8 of the Act, are nevertheless trespassory in nature. Furthermore, we continue to believe that "[u]nlike the power to prevent violence and public disorder, the power to prohibit peaceful picketing that trespasses on the premises of employers involved in labor disputes would 'leave the States free to regulate conduct so plainly within the central aim of federal regulation. . . .' " (Musicians Union, Local No. 6 v. Superior Court, supra, 69 Cal. 2d at p. 711; citation omitted.) We say this mindful of the concern on the part of some members of the high court for the legal hiatus created by federal preemption where trespassory activity is merely "arguably" protected by section 7. In the case at bench, however, such a situation would have existed for a period of 30 days at most. At the end of that time, if the Union had not filed a petition for a representation election, it arguably would have been in violation of section 8(b)(7)(C) and Sears would have been entitled to the remedies discussed above.

Moreover, while the overbreadth of the "arguably protected" standard of preemption may on occasion deprive the landowner of a remedy for an actionable wrong, such incidents merely provide a basis for criticism of the *Garmon* rule itself.[7] (See Cox,

7. Mr. Justice White has on at least two occasions expressed a concern for the hiatus resulting from federal preemption of activities merely "arguably protected." (See Longshoremen Local 1416 v. Ariadne Shipping Co., *supra*, 397 U. S. 195, 201-202 (White, J. concurring); Motor Coach Employees v. Lockridge, *supra*, 403

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Labor Law Preemption Revisited, *supra*, 85 Harv. L. Rev. 1337, 1360-1367.) But the rule remains in effect and we are not free to declare that it is inoperative in the instant case. We therefore conclude that *Garmon* properly controls this case for the reasons set forth by Justice Harlan in his separate memorandum in Taggart v. Weinacker's Inc., *supra*, 397 U. S. 223, in which he responded to Chief Justice Burger: "While I recognize The Chief Justice's and Mr. Justice White's concern over the hiatus created when the Board does not or cannot assert its jurisdiction . . . that consideration is foreclosed, correctly in my view, by *Garmon*. Congress in the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an experienced agency. Where conduct is 'arguably protected,' diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to 'arguably protected activities,' until the Board had acted, even if wrongs may occasionally go partially or wholly unredressed." (*Id.* at p. 230; citations omitted.)

Accordingly, we reaffirm our decision in *Musicians Union* and hold that the Union's trespass upon Sears' property did not justify the assumption of jurisdiction by the superior court to enjoin peaceful picketing "arguably" protected and prohibited

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U. S. 274, 325-332 (White, J. dissenting).) He advocates, however, not the creation of new exceptions to the *Garmon* rule, but a retreat from the doctrine itself. He "would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control." (*Longshoremen*, *supra*, at p. 202.) He "would permit the state court to entertain the action and if the union defends on the ground that its conduct is protected by federal law, to pass on that claim at the outset of the proceeding. If the federal law immunizes the challenged union action, the case is terminated; but if not, the case is adjudicated under state law." (*Motor Coach Employees*, *supra*, at p. 332.) This position has never commanded the support of a majority of the members of the court. (*Id.* at p. 290.)

by federal law.[8] The injunction must therefore be struck down. In view of the foregoing conclusion, we need not consider the Union's contention that its picketing was a constitutionally protected exercise of First Amendment rights.[9]

The order granting a preliminary injunction is reversed.

SULLIVAN, *J.*

We Concur:

WRIGHT, *C.J.*
MCCOMB, *J.*
TOBRINER, *J.*
MOSK, *J.*
CLARK, *J.*
RICHARDSON, *J.*

8. We have previously indicated our rejection of contrary decisions by the courts of Illinois and Wisconsin. (Musicians Union, Local No. 6 v. Superior Court, *supra,* 60 Cal. 2d at p. 712, fn. 8.) We find equally unpersuasive the decisions of our sister states in People v. Bush, *supra* (N. Y. Ct. App. Dock. No. 138, May 4, 1976) ..... N. Y. .....; Taggart v. Weinacker's Inc., *supra,* 283 Ala. 171, and Hood v. Stafford (1964) 213 Tenn. 684, 694-695 [378 S. W. 2d 766, 771].

9. We also note that while the instant case was pending in this court, the Supreme Court in Hudgens v. NLRB, *supra,* ..... U. S. .....,* overruled Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc. (1968) 391 U. S. 308—a case upon which the Union relies for its argument that its picketing was protected by the First Amendment. In view of the fact that the parties have not had an adequate opportunity to brief or argue the effect of *Hudgens* upon the instant controversy, it would be particularly inappropriate for this court to render a decision on this question at this time.

* 44 U. S. L. Week 4281.

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") and the California Penal Code (1970) are set forth below:

NATIONAL LABOR RELATIONS ACT

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

CALIFORNIA PENAL CODE

§ 602. Trespasses constituting misdemeanors; enumeration

Every person who wilfully commits a trespass by any of the following acts is guilty of a misdemeanor: * * *

(k) Posted lands. Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are dis-

played at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands, or

(4) Discharging any firearm.

(1) Occupation. Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.,
Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF AMICUS CURIAE ON BEHALF OF AMERICAN RETAIL FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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AUTHORITIES CITED.

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The American Retail Federation hereby files a brief *amicus curiae* in support of the Petition of Sears, Roebuck and Company for Writ of Certiorari to the Supreme Court of California.[1]

1. Request for consent to file a brief *amicus curiae* has been made to the parties pursuant to Rule 42 of the Rules of this Court. Both parties have given their consent, and written consent will be filed with the Clerk of the Court.

I.

INTEREST OF THE AMICUS CURIAE.

The American Retail Federation is an organization consisting of national and state associations of retailers. The various associations consist of retailers of all types and sizes from small locally-owned stores to major national chains. Thus, the Federation represents the interests of all facets of the retail community. The retail community consists of approximately 1.5 million retailers employing nearly 14 million employees in an industry with a substantial relationship with interstate and international commerce. The industry accounts for over 35 percent of the Gross National Product.

The issue in this case, the jurisdiction of state courts to apply the basic general law of trespass to instances of unauthorized entry upon property by non-employee union agents, is a matter of significant concern to the Federation and its affiliates in the various states, and the individual retailer-members of those affiliates. The absence of definitive guidance from the Court has led to conflicting results from various state courts, leaving retailers, many of whom are the owners of the property on which their stores are located, uncertain as to their rights and remedies when faced with trespass upon their premises. This issue is of particular interest to retailers not only because of the large numbers of persons they employ, but also the large number of companies, *i.e.* supplies, advertising media, *etc.* with whom they do business. As a result, trespass may occur in the context of labor disputes and consumer boycotts involving labor organizations with whom the retailer has no relationship whatsoever. The Federation is vitally concerned that the proper balance be struck between the interest of the various states in insuring domestic peace through the exercise of jurisdiction in cases of trespass and the interest of the federal government in enforcing a uniform labor policy.

The Federation has filed briefs as *amicus curiae* in other cases of similar concern to its members and the retail community, *Central Hardware Company* v. *NLRB*, 407 U. S. 539 (1972), *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970), *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), and is familiar with the problems presented as they affect large and small businesses. A Federation affiliate, the Illinois Retail Merchants' Association, filed a brief *amicus curiae* before the Illinois Supreme Court in a case similar to this in which there was a contrary result. *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976). The Federation believes that its views may be of assistance to the Court in resolving the issues raised.

II.

SUMMARY OF ARGUMENT.

This case presents a question of vital interest to business people, labor organizations, courts, law enforcement agencies and individuals throughout the nation. It is a question that has not yet been decided by this Court and the absence of clear guidance on this issue has resulted in substantial conflict among decisions of various States in an area where the rights of the parties and authority of the States should be made clear. The court below has misapplied the preemption standards set forth by this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 43 LRRM 2838 (1959), and misconstrued the exceptions contained therein for permissible exercise of state authority. It has failed to recognize the relationship between *Garmon* and those cases decided by this Court which consider the relationship between private property rights and federal control of labor relations. *NLRB* v. *Babcock and Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956); *Hudgens* v. *NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 91 LRRM 2489 (1976).

III.

ARGUMENT FOR GRANT OF WRIT.

A. This Case Presents an Important Question of Federal Law Which Has Not Been But Which Should Be Decided by This Court and Which Is for Lack of Guidance the Subject of Conflict in Decision Among the States.

The Petition for Writ of Certiorari addresses this strong reason for the Court's review of the decision below. The Federation agrees with, supports and adopts that portion of the Petition.

The variation of state application of the *Garmon* doctrine underlines the need for re-examination of the *Garmon* guidelines and the establishment of clearer standards on those issues where the impact of varying results is most vexatious.[2]

The Court perhaps recognized that need in granting a Writ of Certiorari in *Hill* v. *United Brotherhood of Carpenters, Local 25, cert. granted* Case 75-804, 44 U. S. L. W. 3427 (1976), in which the Court is presently reviewing the authority of a state court to entertain a common law cause of action arising out of a labor organization's activity that may also subject it to unfair labor practice charges before the National Labor Relations Board. However, the question there presented is distinguishable from this case in that it relates to the existence of common law jurisdiction and to the rights of individual union members vis-a-vis their labor organization, and will not resolve the issue here presented.

Rather, the Court in this case is asked to review the relationship between federal labor policy and the maintenance of domes-

2. The confusion that exists was recently illustrated in *Wiggins & Co.* v. *Retail Clerks Union*, Tenn. Chancery Court, Knox County, No. 57199, 93 LRRM 2782 (Sept. 9, 1976). The court there concluded that this Court's decision in *Hudgens* v. *NLRB*, 424 U. S. 507, 91 LRRM 2489 (1976), deprived state courts of jurisdiction to consider allegations of trespass on private property. Cf. *People* v. *Bush*, 39 N. Y. 2d 529, 92 LRRM 3268 (1976), wherein the court, in a similar trespass case, read *Hudgens* in a conflicting manner.

tic peace by the States through their exercise of jurisdiction in trespass matters and enforcement of their general criminal and civil trespass laws.

B. The Court Below Has Misconstrued This Court's Garmon Rule and Applied It Without Regard to Other Decisions of This Court Involving Private Property Rights and Labor Union Activity.

(1) The Court Below Has Improperly Applied the Garmon Preemption Standards.

This Court, in *San Diego Building Trades Council* v. *Garmon, supra* established its preemption test and the exceptions thereto. State jurisdiction, said the Court, is preempted where the activities which a state purports to regulate are clearly or may fairly be assumed to be protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*

In *NLRB* v. *Babcock and Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956), the background against which *Garmon* was decided, this Court affirmed the primacy of private property rights in the scheme of federal labor relations. This Court held that an owner had no obligation, *ab initio*, to open his real property to non-employee union representatives in organizational situations. The labor organization, it held, has the burden of first asserting and then proving the absence of a suitable alternative to access to private property. This has most recently been reaffirmed in *Hudgens* v. *NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 91 LRRM 2489 (1976).

The court below has thus failed to perceive the relationship between this Court's decisions in *Garmon* and that in *Babcock and Wilcox* which characterized such trespass as presumptively prohibited.[3]

3. We raise the issue of the relationship between *Garmon* and *Babcock and Wilcox* because the court below relied, in part, on a

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(2) This Question Falls Squarely Within the Garmon Exceptions.

In *Garmon,* this Court carved out two exceptions to the general rule where (1) the activity regulated is merely a peripheral concern of the Act or (2) where the regulated conduct touches interests deeply rooted in local feeling and responsibility. In these instances, in the absence of compelling federal direction it should not be inferred that the Congress deprived the States of the power to act.

The National Labor Relations Act was not passed by Congress without reference to the

> ". . . larger context of state law creating rights of property, bodily security, and personality, preserving public order and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union or employee concerned with unionization or a labor dispute. Neither the laws themselves nor any particular application involves weighing the special interests of employers, unions, employees or the public in employee self-organization, collective bargaining or labor disputes. The likelihood that the collateral impact of such laws upon management of labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated." Cox, *Labor Law Preemption Revisited,* 85 Harv. L.R. 1337 at 1355-1356 (1972).

The court below improperly concluded that Congress intended to leave the enforcement of private property rights to individual self-help. Such a conclusion encourages the attendant danger of

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finding that the Union therein had organizational motives. The Illinois Supreme Court drew a connection between these cases in its decision in *May Department Stores* v. *Teamster's Local 743,* 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976), discussed *infra.* Amicus does not understand that this Court has extended the *Babcock and Wilcox* accommodation principle to any situation other than one organizational in nature.

breach of the public peace, while leaving to the trespasser the decision whether to attempt to bear the heavy burden of establishing its need to encroach to the satisfaction of the National Labor Relations Board. Such a result was neither intended by Congress nor supported by this Court in *Garmon* and *Babcock and Wilcox.* It is beyond dispute that it is of great local concern that property owners resort to legal process rather than self-help to enforce property rights, subject to the imposition of remedial action by the National Labor Relations Board in those exceptional cases where it finds that the trespass must be permitted. The court below has thus failed to recognize that the enforcement of local trespass law falls within the *Garmon* exception permitting state regulation of conduct touching interests deeply rooted in local feeling and responsibility. Threats of violence are no less critical to local concern when such violence may be perpetrated by a land owner in protection of his rights than when perpetrated by a labor organization in pursuit of its rights. *Youngdahl* v. *Rainfair,* 355 U. S. 131, 41 LRRM 2169 (1955); *United Automobile Workers* v. *Russell,* 356 U. S. 634, 42 LRRM 2142 (1958); *United Construction Workers* v. *Laburnum,* 347 U. S. 656, 34 LRRM 2229 (1954). This is one factor which persuaded the Illinois Supreme Court to uphold the jurisdiction of Illinois courts to enjoin trespass by non-employee union agents.

In *People* v. *Goduto,* 21 Ill. 2d 605, 174 N. E. 2d 385 (1961), *cert. denied,* 369 U. S. 927, 82 S. Ct. 361 (1961), the Illinois Supreme Court upheld the conviction of union agents for violation of the state criminal trespass statute. In doing so, the Court held that the basic purpose of the statute was the prevention of violence or threats of violence which arise whenever a person refuses to leave the property of another after he has been ordered to do so. That in fact no violence occurred was found immaterial as being attributable simply to the fact that the property owner refrained from resorting to self-help to remove the trespassers.

In *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592, the Illinois Supreme Court relied on its *Goduto* decision in upholding the injunction issued by the Circuit Court of Cook County.

> "The foundation of our opinion in *Goduto* was that an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate his property rights. Such a situation would result from our acceptance of the union's contention that State courts have no authority to act against a trespass by nonemployee union organizers. Since trespass by a union organizer is not an unfair labor practice, the NLRB is unable to grant any relief to a deserving employer. If the employer is also denied access to the State courts, his only recourse is to employ self-help. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972).
>
> "This imminent threat of violence which is inherent in any situation in which an aggrieved party is denied access to a court of law has been recognized by the United States Supreme Court. In *Linn* v. *United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 15 L.Ed. 2d 582, 86 S.Ct. 657, the court allowed State court jurisdiction over an action for malicious libel which has resulted from a union organizational campaign. The *Linn* court noted:
>
> > 'The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.' 383 U.S. 53, 64 n.6, 15 L.Ed. 2d 582, 590 n.6, 86 S.Ct. 657, 664 n.6.
>
> "We consider the foregoing statement fully applicable to the historic and deeply rooted interest of the State in maintaining domestic peace through application of its trespass law remedies. We adhere to the holding of *Goduto* that under the *Garmon* doctrine the States are not pre-

> empted from jurisdiction of a trespass action involving nonemployee union organizers." Slip opinion at p. 5.

Thus, the Illinois Supreme Court's decision is in direct conflict with that of the court below, the latter holding that an injunction against trespass may not stand because the injunction was aimed at protecting not the public welfare but the private rights of the property owner. The court below failed to perceive the threat of violence created by the failure to enforce restrictions on trespass as a matter of local concern within the *Garmon* exception.

The California court has also failed to recognize that exercise of state jurisdiction in trespass matters is within the *Garmon* exception where the matter is of only peripheral importance to the administration of federal labor policy. Here again, the California Supreme Court is in direct conflict with the Supreme Court of Illinois which found in its *May* decision that:

> "The temporary injunction entered by the circuit court did not present a potential conflict with Federal Labor policy, nor did it adversely affect any rights granted the union by the NLRA. The injunction was narrowly aimed at organizational activity on company property and specifically noted that it was not to apply to solicitation on the public sidewalks adjacent to the Venture parking lot. The temporary injunction merely had the effect of maintaining the status quo during the pendency of the NLRB proceedings. No prejudice to the union could result from this pattern since the injunction could have been vacated immediately upon an NLRB finding in favor of the union. In the highly unlikely event that the circuit court would refuse to vacate the injunction in these circumstances, the NLRB could provide relief by seeking to enjoin the order of the State court. *NLRB* v. *Nash-Finch Co.* (1971), 404 U.S. 138, 30 L.Ed. 2d 328, 92 S.Ct. 373." Slip opinion at p.6.

This exercise of state court jurisdiction is merely peripheral to the administration of the Act. The state courts do not seek to make those determinations reserved to the Labor Board, but

only to maintain the *status quo* peacefully while the Labor Board acts.[4]

Clearly, to permit the exercise of such State jurisdiction is consistent with and in support of a uniform federal labor policy. It peacefully encourages resort to NLRB procedures for the uniform application of statutory standards. The only means of access to the Board for a determination of whether private property rights must yield to those created by the National Labor Relations Act is for the employer to deny access to its property. The union must then file an unfair labor practice charge. Congress has provided no vehicle for a property owner to request such determination from the National Labor Relations Board. The labor organization will not file such a charge so long as it has the opportunity to encroach on private property without challenge. To provide for the property owner's resort to the state courts to seek the protection of State trespass laws, rather than leave him no remedy but resort to self-help, peacefully encourages the labor organization to place the question before the Board for determination.

4. The distinction between making the final decision and merely maintaining the status quo to permit the Labor Board to do so was clearly recognized by the New York Court of Appeals in *People* v. *Bush, supra* 39 N. Y. 3268, 92 LRRM 3268 (1976).

> ". . . Under the preemption doctrine of Garmon, it is not for us to say whether, had they [the trespassers] applied to the NLRB, they could have brought themselves within the limitations set out in Babcock and Hudgens. It is our province, however, to say that they should have ascertained these limits as they applied to the picketing in question here before remaining intransigently on private property."

IV.

CONCLUSION.

For the foregoing reasons, the Amicus respectfully requests that the Court grant the Petitioner's request for a Writ of Certiorari to the California Supreme Court.

Respectfully submitted,

JOHN W. NOBLE, JR.,
PAUL B. SCHECHTER,
FRIEDMAN & KOVEN,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorneys for The American Retail Federation.

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR CERTIORARI FILED DECEMBER 1, 1976
CERTIORARI GRANTED FEBRUARY 28, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750.

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

TABLE OF CONTENTS.

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO.

Sears Roebuck & Company, *Plaintiff,* vs. San Diego County District Council of Carpenters, and Does 1 through 100, *Defendants.*	No. 347511

COMPLAINT FOR INJUNCTION (CONTINUING TRESPASS)

Plaintiff alleges:

I.

Plaintiff, Sears Roebuck & Company (hereinafter referred to as "Plaintiff") is and at all times pertinent was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with places of business in the State of California and other states.

Plaintiff is and at all times mentioned was engaged in the operation of a retail department store at 555 5th Avenue, Chula Vista, San Diego County, California.

II.

Defendant, San Diego County District Council of Carpenters (hereinafter referred to as "Carpenters") is and at all times mentioned was a labor organization within the meaning of the National Labor Relations Act, as amended, and is organized for the purpose of negotiating terms and conditions of employment on behalf of the employees it represents and for the purpose of representing employees in collective bargaining, all within the County of San Diego, California.

III.

DOES 1 through 100, inclusive, are labor organizations or are members, officers or agents of one or more of said labor organizations or of Carpenters. Plaintiff does not know the true names and capacities of the organizations and individuals sued herein as DOES, and pursuant to the California Code of Civil Procedure, Section 474, Plaintiff will amend its complaint to show the true names and capacities of these fictitious defendants when those names have been ascertained by Plaintiff at or before the time of trial or hearing.

IV.

Commencing at approximately 10:00 a.m. on October 26, 1973, Defendants, their agents, representatives, officers, picket captains, pickets and other persons acting under the direction, control and at the invitation of the Defendants, authorized, established and caused to be established and assisted in and sanctioned and at all times maintained and do now maintain picket lines on and about the property of Plaintiff's facility as hereinafter alleged. Said picket lines have been established and now are and at all times herein mentioned have been maintained.

V.

Attached hereto and made a part hereof by this reference as though set forth at length herein, is Exhibit A which constitutes a schematic drawing of Plaintiff's retail department store and property located at and about 555 5th Avenue, Chula Vista, San Diego County, California. Said picket line has been maintained and is now maintained on the private property of Plaintiff at said location. Said location and property of Plaintiff is for the exclusive use of Plaintiff, its customers, employees, agents, and suppliers, and no business is maintained on said property that is not operated or controlled by Plaintiff.

VI.

On October 26, 1973, shortly after said picket line was established on Plaintiff's property, Plaintiff did notify the pickets and Defendants that said pickets were on the private property of Plaintiff and Plaintiff demanded that said pickets leave said property immediately. Said pickets did leave the property upon Plaintiff's demand, but returned in a short time on the same day, October 26, 1973. Upon the return of the pickets, Defendants informed Plaintiff that said pickets of Defendants would remain on the private property of Plaintiff unless and until ordered to leave by a court of law. Defendants continued to maintain and do now maintain said picket lines as alleged on the said private property of Plaintiff.

VII.

Defendants have access to the public sidewalks adjacent to the said property of Plaintiff where said pickets could patrol in the full view of the employees, customers, and suppliers of Plaintiff; Defendants have chose not to use said public sidewalks, but rather have continued to maintain said picket line on the private property of Plaintiff despite the objections of Plaintiff.

VIII.

Said pickets, pursuant to the instigation and direction of Defendants, have attempted to dissuade customers of Plaintiff from doing business with Plaintiff, and Plaintiff is informed and believes and based thereon alleges that customers of Plaintiff have refused to shop at Plaintiff's department store because of the statements of said pickets and because of the presence of said pickets on the private property of Plaintiff.

IX.

Plaintiff is informed and believes and based thereon alleges that Defendants and each of them, and other diverse persons unknown to Plaintiff have conspired together in concert to commit the unlawful acts against Plaintiff of interfering with Plaintiff in the lawful conduct of its business and engaging in continuing trespass onto the property of Plaintiff. Each of the acts complained of herein has been done in furtherance of said conspiracy.

X.

The Defendants, and each of the [sic], have performed and continue to perform the acts and things herein complained of deliberately, willfully and intentionally, with the full knowledge of the illegality of said acts and for the purpose of injuring Plaintiff in the conduct of its business. Plaintiff is informed and believes and upon such information and belief alleges that Defendants, and each of them, will continue to do the acts complained of herein unless restrained and enjoined from doing so by this court.

XI.

Each and every act herein complained of was done maliciously, unlawfully, and oppressively and with the intention to injure, vex, harass and annoy Plaintiff in the conduct of its business.

XII.

The acts of Defendants complained of herein have caused, are causing and will continue to cause so long as said acts are continued, irreparable damage to Plaintiff. As a direct and sole result of said acts, Plaintiff's goodwill has been, is being, and so long as the acts complained herein continue will be seriously impaired. The amount of monetary damages to Plaintiff's business

as a result of the acts of Defendants complained of herein is extremely difficult, if not impossible, to ascertain. Further monetary and other damage to Plaintiff's business as a direct result of said acts complained of herein can only be prevented by the granting of injunctive relief prayed for herein.

XII.

Unless restrained by this court, Defendants will continue the said acts continuously or intermittently and will continue to cause the injuries hereinabove referred to, and will cause said injuries before the matter can be heard on notice. Plaintiff has no plain, speedy or adequate remedy at law, and the restraint of this court is necessary to prevent a multiplicity of judicial proceedings concerning the continuing trespass of Defendants.

WHEREFORE, Plaintiff prays judgment as follows:

1. That Defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, be permanently enjoined from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street, and I Street in Chula Vista, California.

2. That an order be made directing the Defendants, and each of them, to show cause at a time and place specified therein why they, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, should not be enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street and I Street in Chula Vista, California.

3. That the court, upon the ex parte application of the Plaintiff, and upon reading Plaintiff's verified complaint herein and the declarations annexed thereto, grant a temporary restraining order against Defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, from doing any of the acts set forth in paragraph 1 above, pending a hearing on the order to show cause re preliminary injunction herein.

4. For Plaintiff's costs of suit herein incurred.

5. For all other and further proper relief.

Gray, Cary, Ames & Frye
By: /s/ James K. Smith
James K. Smith

Dated: October 29, 1973

I, ROBERT D. WELLS, declare as follows:

I am the Operating Superintendent of the Chula Vista Store of SEARS ROEBUCK & COMPANY, Plaintiff in the above-entitled matter; I am fully informed of the facts alleged in the within complaint; the same is true of my own knowledge except as to those matters as stated therein on information and belief and to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 1973.

/s/ Robert D. Wells
Robert D. Wells

EXHIBIT A

347511

H-STREET

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF KENNETH V. LAUHER, JR. IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE.

I Kenneth V. Lauher Jr., declare and say I am Credit Sales Manager at Sears, Roebuck and Co., Chula Vista # 1358, employed by Sears, Roebuck and Co., on October 26, 1973 I saw a man carrying a picket sign step into the path of an automobile and inquired of the occupants "Do you ladies intend shopping at Sears?" I did not hear their response, but the car had stopped. He then said "We would appreciate it very much if you would not." The car then proceeded.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego County, California on October 29, 1973.

/s/ Kenneth V. Lauher Jr.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.

On reading the verified complaint of Plaintiff on file herein together with the declarations and exhibits attached thereto, and the memorandum of points and authorities submitted therewith, and it appearing to the satisfaction of the court that this is a proper case for granting an order to show cause and a temporary restraining order, and that unless the temporary restraining order prayed for in said complaint is granted, great and irreparable injury will result to Plaintiff before the matter can be heard on notice.

Now, THEREFORE, IT IS HEREBY ORDERED that the above-named Defendants, and each of them, appear before this court in the Department #11 thereof at the San Diego County Courthouse, 220 West Broadway, City and County of San Diego, California on the 12 day of December, 1973 at the hour of 1:30 P. M., then and there to show cause if any they have why they, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, should not be enjoined and restrained during the pendency of this action from causing, instigating, furthering, participating in, or carrying on picketing on the Plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, H Street and I Street in Chula Vista, California.

IT IS FURTHER ORDERED that pending the hearing and determination of said order to show cause, the Defendants, and each of them, their officers, agents, representatives, members and all others acting for, on behalf of, or in concert with them,

or any of them, shall be and they hereby are restrained and enjoined from doing any of the acts hereinabove set forth in the order to show cause.

Dated: Oct. 29, 1973.

(Illegible)

Judge of the Superior Court.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.
In and for the County of San Diego.

SEARS ROEBUCK & COMPANY,
Plaintiff,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, and DOES 1 through 100,
Defendants.

No. 347511

DECLARATION OF ELBRIDGE G. McCONNELL IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE.

I, Elbridge G. McConnell, declare and say:

I am the Security Manager of the retail department store owned by Plaintiff located at 555 5th Avenue, Chula Vista, California.

On October 24, 1973, at about 4:00 p.m., I was called to the customer service counter of the store. When I arrived at the counter two men introduced themselves to me as business representatives of the Carpenters' Union. One of the two men told me his name was Dallas Roose, and I believe that the other man was introduced as Floyd Cain. Mr. Roose asked me who was doing the work of remodeling the women's fashions department of the store. I told him it was being done by employees of Plaintiff. He asked if he could talk to someone at the store about members of the Carpenters' Union doing the work of remodeling at the store. I told the two business representatives that they should speak to the Store Manager, Mr. J. L. Ochoa, about that subject. I then took the two men to Mr. Ochoa and introduced them to him.

On October 26, 1973, at about 8:30 a.m., I was told that five pickets were about to enter the parking lot of the Plaintiff's

Chula Vista Store. I went to the parking lot areas and saw five pickets patrolling on the store parking lot areas immediately adjacent to the walkways next to the store building. Each picket carried a sign which read in substance:

I am an AFL-CIO Picket.

Sanctioned by the Carpenters' Trade Union.

The pickets were walking in the store parking lot next to the walkways on the west, north, and east side of the store building.

I and my assistant, Dean Cochran, contacted each of the five pickets. We told each of the pickets that they were on the private property of the Plaintiff, and that they did not have permission to picket on that private property. We told each of them that the sidewalks on the outer perimeter of the store parking lot fronting 5th Avenue, H Street, and I Street were public sidewalks. We asked each of the pickets to leave the property of Plaintiff, and suggested that they continue their picketing on the public sidewalks abutting the Plaintiff's property. Three of the five pickets left the private property of the Plaintiff when first requested and began picketing on the public sidewalks on 5th Avenue and H Street. The other two pickets did not leave until about five minutes after they were told to do so, but then joined the other three pickets and also patrolled on the public sidewalks on 5th Avenue, and H Street.

After all five pickets had left the Plaintiff's property, I observed one of the pickets go to a public phone booth. Shortly thereafter I observed that same picket leave the phone booth and approach each of the other pickets.

At about 9:30 a.m. on the same day, October 26, 1973, I observed the five pickets return to the private property of the store and again patrol with the picket signs on the parking area immediately adjacent to the walkways on the west, east, and north sides of the store. At about that same time, I saw an automobile drive into the parking area, stop, and one of the passengers spoke to the pickets. The automobile parked on a

parking roadway adjacent to the walkway on the west side of the building. I recognized one of the men in it as the Carpenters' business representative with whom I had spoke two days' before, Mr. Roose.

I approached the automobile and spoke with Mr. Roose. I told him that his pickets were on private property and requested that he direct them to leave the plaintiff's property and picket on the public sidewalk. Mr. Roose said that the parking area of Plaintiff's store was a public thoroughfare and his pickets did not have to leave. I again requested that the business representatives remove the pickets from the private property of Plaintiff. Mr. Roose then said that the pickets would not leave the store property unless legal action compelled them to leave.

Pickets remained on the store property throughout the remainder of the business day on Friday, October 26, 1973, and picketing was conducted on the store property at the same locations as referred to above during store business hours on Saturday, Sunday, and today, October 27, 28, and 29.

Posted at numerous locations in the parking lot of the Sears Chula Vista Store are signs stating that solicitation and distribution of handbills is prohibited without prior permission of the store manager. These signs have been conspicuously posted since at least 1967. The policy of Sears concerning solicitation and distribution as posted has been enforced since I have been employed by Plaintiff. Plaintiff has permitted solicitation and distribution of literature on its property only in a few cases; the only instances of permitted solicitation and distribution on Plaintiff's property have been involving the Lion's Club white cane drive, Salvation Army at Christmas only, and the League of Women Voters for voter registration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 1973, at San Diego, California.

/s/ ELBRIDGE G. MCCONNELL
Elbridge G. McConnell

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF J. L. OCHOA IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

I, J. L. OCHOA, declare and say:

I am the Store Manager of the Chula Vista retail store of Sears Roebuck & Company. I have held that position since October of 1965. This store opened for business in February of 1966. Sears Roebuck & Company has owned the property on which the store and parking facilities are located since prior to my becoming manager in October of 1965.

The Sears Roebuck & Company retail store is the only retail operation conducted on the property depicted in Exhibit "A" to the complaint which is filed herein. The property is surrounded on three sides by public sidewalks and public streets. On the fourth side of the block there are private residences separated from the store by a concrete block wall. The store contains approximately 250,000 square feet. The parking lot contains approximately 1,000 spaces for the parking of automobiles. The parking lot is maintained and controlled solely for the use of customers of Sears Roebuck & Company.

The pedestrian walkways and sidewalks in and around the parking lot and immediately adjacent to the store are maintained solely for the use of customers of Sears Roebuck & Company. There are "Stop" signs located on the sidewalk and parking lot. These "Stop" signs are identical in appearance to those used by the City of Chula Vista on the adjacent public streets. These "Stop" signs were purchased at my direction by Sears Roebuck & Company and were installed at the Company's expense. They are owned and maintained by Sears Roebuck & Company. Additionally, the Company has purchased and installed "No Parking" signs along the curb edge of the side-

walk adjacent to the store. I do not believe these signs are identical in appearance to those utilized on the public streets by the City of Chula Vista. All of these signs are the property of Sears Roebuck & Company and were purchased and installed at the Company's expense approximately two to three years ago.

Additionally, a United States Post Office mailbox is located on the sidewalk adjacent to the store. Soon after the store opened the Post Office requested permission of Sears Roebuck & Company to place one mailbox on the sidewalk. Sears Roebuck & Company granted permission for that mailbox to be placed on the sidewalk for the convenience of its customers. The United States Post Office owns and maintains that mailbox.

The curbs adjacent to the sidewalks surrounding the store are painted red with the exception of a limited area on the rear portion of the store which is yellow and marked for "Fifteen Minute Parking". The "Fifteen Minute Parking" area is for Sears Roebuck & Company customer pickup. Sears Roebuck & Company painted and maintains these curbs.

In the general vicinity of the Chula Vista store there are various other retail businesses. All of these businesses are separated from the Sears Roebuck & Company retail store by public sidewalks and streets. Each of them maintains, or have maintained for them, their own separate parking facilities for the benefit of their customers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 1973 at San Diego, California.

/s/ J. L. Ochoa
J. L. Ochoa

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF FLOYD CAIN

I, FLOYD CAIN, declare:

I am a business representative for the San Diego District Council of Carpenters and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Local 1571 is a labor organization which represents its members with regard to wages, hours and working conditions.

I have been a member of Local 1571 which is a carpenter's union affiliated with the District Council, since 1951 and I have been a business representative of the District Council since May, 1973.

On or about October 28, 1973, one of the members of the District Council told me that Sears Roebuck & Company was performing carpenters work in their Chula Vista store. It is part of my job as a business representative for the District Council to insure that all work performed within the carpenter classification as that term is used in our International Constitution and our Collective Bargaining Agreement is performed pursuant to dispatch from the hiring union halls named by the District Council and its local affiliates.

Accordingly, I viewed the premises of the Sears Roebuck & Company store at Chula Vista on October 24, 1973, to determine whether or not such work was being performed. At that place and time I observed the erection of platforms and other wooden structures by persons who had not been dispatched from our hiring halls. All of the work which I observed is covered by our master agreement by building construction in the Building Trades Council of San Diego County and all other work falls into the journeymen carpenter classification.

Later that same day I met Joe Ochoa, manager of the Chula Vista store. I introduced myself and explained to him that the work being performed was carpenter work and that the particular carpenter at the job had not been dispatched by our hiring halls and that other workers performing other work at their store were clerical workers in the store by their own admission.

I was accompanied by Dallas Roose, business representative for the District Council and financial secretary of Local 1490, another local affiliate of the District Council.

Mr. Roose and I asked Mr. Ochoa either to contract the work through a bona fide building trades contractor who would in turn utilize qualified and dispatched carpenters to perform the carpenter work in question; or in the alternative to sign a short form agreement which would require Sears to abide by the terms of the master contract agreement with regard to the dispatch and use of carpenters in completing the construction on that job.

Mr. Ochoa said he would look into that matter and let us know the very next day.

Before leaving we also pointed out that many of our members patronized that store and lived in that area and were out of work and we requested his cooperation.

Mr. Ochoa never advised me of their position and although I made a minimum of two telephone calls on the following day, none of them were returned and I was ultimately advised that Mr. Ochoa would be out of town until the following Monday.

Upon being so advised, I reported this information to Dallas Roose. The decision was then made by Mr. Roose to authorize the publicizing by the District Council of the fact that Sears Roebuck & Company was undercutting prevailing standards for the employment of carpenters by the establishment of pickets at the premises of the store.

Subsequently, authorization was obtained by Mr. Roose for sanction by the San Diego County Building Trades Council

sanctioning the picketing by the District Council as bona fide, legitimate and proper in all respects under the standards for pickets set by the AFL-CIO and its affiliates throughout the country.

Mr. Roose and I have relocated the pickets in accordance with the temporary restraining order as soon as we learned it had been issued. However, the pickets are now anywhere from one hundred-fifty to two hundred feet from the Sears building at which the work is being performed and in some cases much farther than that.

On Thursday, November 8, 1973, I took pictures pursuant to direction of legal counsel, from various angles of the Sears building and appurtenant structures including state traffic signs and a U. S. Mailbox, all of which are located on the sidewalk around the Sears store. Copies of those pictures are attached hereto, marked Exhibits "A" through " ", and incorporated herein by this reference.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 1973.

/s/ Floyd Cain
Floyd Cain

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EXHIBIT "A"

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EXHIBIT "B"

EXHIBIT "C"

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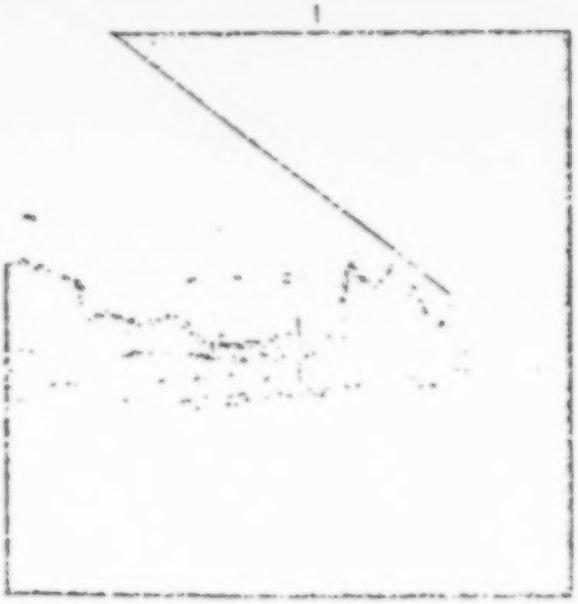
EXHIBIT "D"



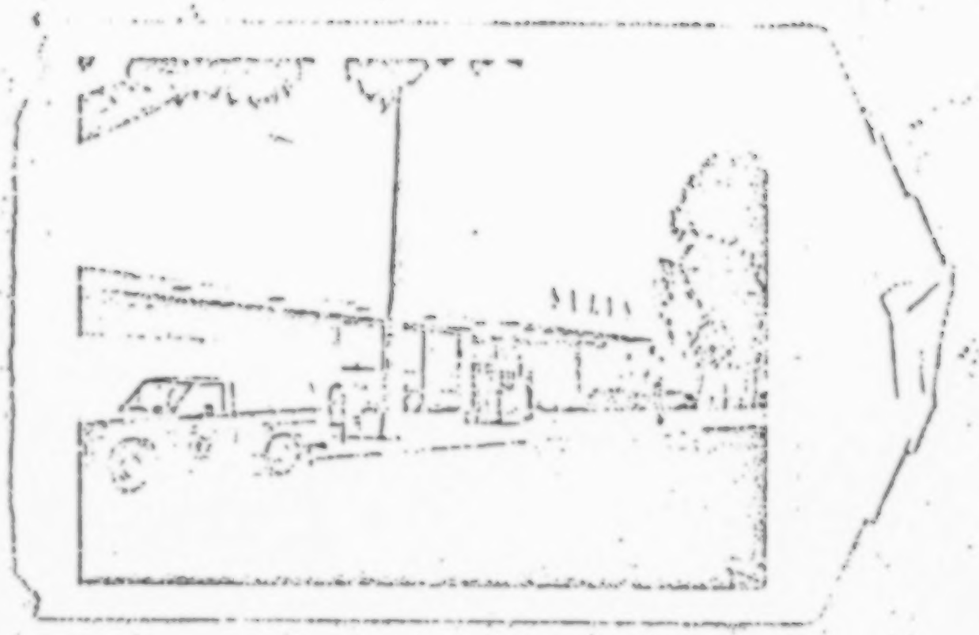


EXHIBIT "E"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DEMURRER TO COMPLAINT.
(C. C. P. Section 430)

Defendant, SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS demurs to the Complaint herein on the following grounds:

I.

The Court has no jurisdiction over the subject matter of this action.

(*C. C. P.* Section 430.10(a))

II.

The Complaint does not state facts sufficient to constitute a cause of action.

(*C. C. P.* Section 430.10(f))

WHEREFORE, Defendant prays that its Demurrer be sustained, that the Temporary Restraining Order be vacated, and that Defendant have judgment for its costs and for all other proper relief.

I hereby certify that this Demurrer is filed in good faith, is not filed for the purpose of delay, and that in my opinion the grounds are well taken.

Dated: November 12th, 1973.

BRUNDAGE, WILLIAMS & ZELLMANN

By: /s/ Jerry J. Williams
Jerry J. Williams
Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

DECLARATION OF DALLAS V. ROOSE

I, DALLAS V. ROOSE, declare:

I am a business representative for the San Diego District Council of Carpenters (hereinafter referred to as the District Council of Carpenters) and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

On October 29, 1973, I was informed that a temporary restraining order was issued against the District Council of Carpenters, said order requiring that I remove the picket line located at Sears and Roebuck, which is located in Chula Vista, to the outside public sidewalk which encircles the Sears Store.

I immediately complied with the terms of the Temporary Restraining Order.

Because the picketing was restricted to the outer sidewalk, the picketing became totally ineffective.

For that reason, I had to totally withdraw the pickets from the Sears Store. From November 12, 1973, to the present, there has been no further picketing of the Sears Store in Chula Vista by the District Council of Carpenters.

The only way our picketing can be effective is by placing said pickets as close to the non-union work as possible. This means that our pickets must be allowed *on* the sidewalk immediately adjacent to the building which houses the Sears Store.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 15, 1973.

/s/ Dallas V. Roose
Dallas V. Roose

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

SUPPLEMENTAL DECLARATION OF J. L. OCHOA—IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

I, J. L. OCHOA, declare and say:

I am the Store Manager of the Chula Vista retail store of Sears Roebuck & Company. I have held that position since October of 1965. This store opened for business in February of 1966. Sears Roebuck & Company has owned the property on which the store and parking facilities are located since prior to my becoming manager in October of 1965. As Store Manager of the Chula Vista retail store I am fully cognizant of its operations and labor relations.

Subsequent to the service of the temporary restraining order on October 29, 1973, issued by this Court, on the Defendant, San Diego County District Council of Carpenters, the pickets on October 30, 1973 complied with the terms of the temporary restraining order by removing themselves to the public sidewalks on the perimeter of the plaintiff's private property. Those pickets continued to picket on the public sidewalks through November 12, 1973. Since that date they have not returned.

There are no walls, fences, berms or other obstructions adjacent to the public sidewalks which would result in the pickets not being visible to customers, employees or suppliers of Sears Roebuck & Company. In fact, the pickets, while located on the public sidewalk, are in complete view of all customers, employees and suppliers entering or leaving the private property of Sears Roebuck & Company through one of the driveways.

It has come to my knowledge that the picketing of defendant on the public sidewalks in compliance with the temporary restraining order has resulted in the following incidents:

1. On November 2, 1973 a telephone repairman dispatched by Pacific Telephone and Telegraph Company refused to enter upon the private property of Sears Roebuck & Company as a result of defendants pickets.

2. On November 5, 1973 a delivery truck dispatched by Maremont Marketing refused to cross defendant's picket line on the public sidewalk. This delivery truck was to deliver mufflers and other automotive parts to the Sears Roebuck & Company store.

3. On November 12, 1973, a contractor, Cal-Gon, was on the private property of Sears Roebuck & Company installing a vapor recovery system on the gasoline dispensing pumps located on the Sears Roebuck & Company property. As a result of defendant's pickets on the public sidewalks the employees of that contractor refused to make such installation and left the premises of Sears Roebuck & Company.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 16, 1973 at San Diego, California.

/s/ J. L. Ochoa
J. L. Ochoa

Reporters' Transcript of November 16, 1973, at pages 17, and 29-30:

[17] to read the pickets—or pay attention to what's on the picket sign in terms of entering or ingress or egress from the shopping center itself.

But more to the question of whether or not Sears Roebuck is dedicated to the public use is evidenced by pictures attached in the affidavit of Mr. Cain, a business agent for the District Council of Carpenters. One picture clearly demonstrates the post office—or, pardon me, a mailbox right out there on the sidewalk, which is immediately adjacent to the building. The sidewalk is a rather wide sidewalk. I have pictures here to demonstrate to your Honor, if you would like me to send those up.

David, I have another batch.

THE COURT: Here you are.

MR. MANNING: He's got one Polaroid of the mailbox. We couldn't get it duplicated. The point we are making, your Honor, is that certainly plaintiff was not asserting that only customers of Sears Roebuck come in and use that post office box. I think that various of the incidents involved here, namely, the stop sign, does have the same shape. I'm sure the customers don't know whether or not, by and large, as laymen, whether or not Sears maintains it or whether the public maintains it.

But the fact does remain that they are inviting the public at large to shop, to mill around or even to mail a letter for that purpose. So I think we are to the point that. . . .

* * * * *

[29] . . . or the greatest amount of people who are going to use the services of someone with which the union has a dispute, a bargaining dispute or a labor dispute of any type. These gentlemen have stood on the picket. They have seen that the people cannot see their signs. They are prepared to testify to that and they are prepared to testify concerning various other delivery trucks that don't see the signs at all, that can go through with-

out, you know, seeing the signs because of the traffic situation. I want that clear to the Court.

Thank you.

THE COURT: All right. Like all courts I have to follow the law. I don't make the law in the lower court. I think Central Hardware is an impressive case that seems to set out the situation.

What I don't like about it, I can conceive of a situation, as I told you earlier, where you could have a store like Sears Roebuck with a half mile of public parking, which would make picketing ineffective and I think really destroy the First Amendment rights.

When I was asking the question about how many doors you had, your diagram here that you give just shows one door, and I thought that maybe we could reach a point where you could put just one picket up there by the door and limit it.

MR. GEERDES: I believe that's just the loading dock, your Honor.

THE COURT: I think that I will have to find that this [30] is not industrial property; that P. C. 552.1 limits this right to enter to industrial property; that it is private property, and that a preliminary injunction will be granted. Picketing will be limited to the public sidewalks of Sears Roebuck.

Again I say that I don't like the decision, but I am bound by it. I think that there should be some latitude given when there is size, but your citations you give me indicate that size is not the controlling factor in these cases.

MR. GEERDES: Your Honor, would a minimum bond be acceptable?

THE COURT: I suppose—

MR. GEERDES: There is no evidence.

THE COURT: No evidence as to violation. Everything has been quiet, orderly. What do you want? A thousand dollars?

MR. GEERDES: Fine. We will post it. Thank you.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

UNDERTAKING UNDER SECTION 529 C. C. P.

WHEREAS, the above named Plaintiff desires to give an undertaking for Preliminary Injunction as provided by Section 529 C. C. P.

NOW, THEREFORE, the undersigned Surety, does hereby obligate itself, jointly and severally, to the above named Defendants under said statutory obligations in the sum of ONE THOUSAND AND NO/100 Dollars ($1,000.00).

In testimony whereof, the said Surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officer.

Signed, sealed and dated this 20th day of November, 1973.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Bond No. 8716383

The premium charge for this bond is $20.00 Dollars per annum.

By /s/ Robert E. Mark
Robert E. Mark
Attorney-in-Fact

STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO, } ss.

On November 20th, 1973, before me, the undersigned, a Notary Public of said county and state, personally appeared ROBERT E. MARK, known to me to be the Attorney-in-Fact of the corporation that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

/s/ Eunice Bolash

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

PRELIMINARY INJUNCTION

Pursuant to this Court's order granting a preliminary injunction, and the plaintiff's filing an undertaking approved by this Court in the sum of $1,000.00;

IT IS HEREBY ORDERED that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendants, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

Dated this 21 day of November, 1973.

/s/ J. A. Kilgarif
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA.

* * (Caption—347511) * *

ORDER GRANTING PRELIMINARY INJUNCTION

The above matter came on regularly for hearing on November 16, 1973 in Department 6 of the above entitled Court pursuant to an order to show cause why a preliminary injunction should not issue. Gray, Cary, Ames & Frye, by David B. Geerdes, appeared as counsel for plaintiff, and Brundage, Williams & Zellman, by Thomas B. Manning, appeared as counsel for defendant, San Diego County District Council of Carpenters.

On proof being made to the satisfaction of the Court, and good cause appearing therefore;

IT IS HEREBY ORDERED that during the pendency of this action, or until the final determination thereof, or until the Court shall otherwise order, defendant, and each of them, their officers, agents, representatives, members, and all others acting for, on behalf of, or in concert with them, or any of them, and their attorneys, shall be, and hereby are enjoined and restrained from causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property located at 555 5th Avenue, Chula Vista, California, which property is bounded by and adjacent to public sidewalks on 5th Avenue, "H" Street and "I" Street in Chula Vista, California; this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, "H" Street and "I" Street which are adjacent to the private property of plaintiff.

IT IS FURTHER ORDERED that a preliminary injunction be issued as hereinabove set forth, upon plaintiff's filing and undertaking in due form, to be approved by this Court, in the sum of $1,000.00.

Dated this 21 day of November, 1973.

/s/ J. A. Kilgarif
Judge of the Superior Court

Reporter's Transcript of January 4, 1974, at pages 14-16.
[14] . . . which I addressed myself and which are relevant.

With regard to the Penal Code provision, I did mention that since it is relied upon as legislative support for the Court's decision in the *Schwartz-Torrance Investment Corporation* case.

I can't think of any other matter.

THE COURT: The first question in my mind was the first problem, and that is it's preempted by the NLRB. If that is true, why don't you invoke the powers of the NLRB by putting the matter in their hands, if it is so preempted?

MR. WILLIAMS: There is no way of doing that, your Honor.

THE COURT: Then who acts? If the NLRB cannot act, why can't this Court act? This is the problem. You tell me that it's preempted but now you tell me they cannot act. The question is if they can't act, who does act?

MR. WILLIAMS: Well, —

THE COURT: And I am not talking about the merits; I am merely talking about jurisdiction.

MR. WILLIAMS: Yes, your Honor.

THE COURT: I would agree with you if this were a situation where you could take this case and say, all right, this is the NLRB and then let them handle the merits of the case. That would be one thing. But you tell me we can't go to the NLRB, you have no jurisdiction. Therefore, nobody has anything that can be done about it. Is this what [15] you are telling me?

MR. WILLIAMS: Yes, your Honor. I am saying there is no case, there is no cause of action, that a union has a right to picket as the California Supreme Court has indicated and the employer has the right to resist that picketing.

THE COURT: I am talking about jurisdiction. I am talking about your first point. As I understand your point, the issue in this case is without the jurisdiction of this Court because the subject matter is preempted by the NLRB legislation; is that correct?

MR. WILLIAMS: No, not quite, your Honor.

I am saying that the National Labor Relations Act, supplemented by the amendatory Labor Management Relations Act, says that labor organizations have the right to picket, to engage in concerted activities, and that those rights shall not be infringed. That does not mean that we can ask the National Labor Relations Board to come into this court and resolve the injunction. We have to address ourselves to that, and that is why we are here.

THE COURT: Where does that touch the jurisdiction of the Court? I may be bound by what the National Labor Relations Act provides and its amendments, but as far as the power of the Court to act—and this is what you are challenging when you say the jurisdiction I suppose. I am wondering about that.

[16] MR. WILLIAMS: Yes.

The Supreme Court of the United States ultimately held in Garmon I and Garmon II, and we have cited Garmon II—this was the second case, 359 U. S.—ultimately held that both State and Federal Courts are without jurisdiction to act when we are dealing with rights such as picketing arguably protected by Section 7. That does not mean that the Labor Board must act or it will act. It certainly means there is no jurisdiction in either State or Federal Courts.

Was there any other question?

THE COURT: No, that was the only problem I had in my mind.

The matter will be deemed submitted.

MR. SMITH: Your Honor, could I make one short comment on the record?

The question of jurisdiction does come up by implication in the Schwartz-Torrance case. It's a shopping center admittedly, but nowhere in that decision does the Supreme Court of this State have any problem of jurisdiction to decide the constitutional merits. I could not make that representation with Logan Valley because they specifically omitted to consider that.

THE COURT: I want to review the Central Hardware case and also the Garmon case primarily before making a ruling.

(Court adjourned in this matter.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.
Petitioner,

VS.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, San Diego District Council of Carpenters, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the Supreme Court of California entered in this case on September 2, 1976, be denied.

OPINION BELOW

Petitioner correctly states the relevant opinions below. See Petition, Appendices A-E.

JURISDICTION

The jurisdictional requisites are set forth in the Petition (p. 2). This Court has jurisdiction under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Should state courts be allowed to enjoin peaceful labor organization picketing on the basis of local trespass laws as a further exception to the *Garmon* doctrine of federal preemption?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151 *et seq.;* California Labor Code, Section 923, reprinted as Appendix A hereto; California Penal Code Section 602 as set out in the Petition (Appendix F, p. A47); and Section 552.1 of the California Penal Code, reprinted in Appendix B hereto.

STATEMENT OF THE CASE

Sears, Roebuck and Co. ("Sears") owns and operates a retail department store in Chula Vista, California. The store building, its abutting walkways and a spacious parking lot on three sides occupy an entire city block, bounded by a public sidewalk on all four sides. There are parking and traffic control signs identical to those of the municipality posted at the curbs and throughways of Sears. Anchored to the Sears' sidewalk is a conventional red, white and blue United States mailbox to which the public has unqualified access.

In late October of 1973, the San Diego District Council of Carpenters ("Union") was informed that Sears was performing carpentry in its Chula Vista store. On October 24, 1973, two business representatives of the Union met with the manager of the Sears Chula Vista store and requested that the carpentry work be contracted through a legitimate building trades contractor who would utilize qualified Union-dispatched carpenters; or in the

alternative, that Sears sign a short form collective bargaining agreement with the Union. The Sears manager assured the Union agents that he would look into the matter and get back to them by the next day. However, the Sears manager failed to advise the agents and repeated attempts to contact the manager proved unavailing.

Compelled to publicize the fact that Sears was undercutting prevailing standards for the employment of carpenters, the Union established a picket line on October 26, 1973, at the Sears Chula Vista store. The pickets patrolled on and near the walkways abutting the Sears building, never interfered with vehicular or pedestrian traffic, and were at all times peaceful and unobtrusive. However, Sears demanded of the Union that the pickets leave, claiming that the entire city block occupied by its Chula Vista store was private property and that the pickets were trespassing. The Union politely declined to do so, absent judicial proscription.

Sears then sought an injunction in the San Diego Superior Court from which a temporary restraining order issued on October 29, 1973, ordering the removal of Union pickets from the city block occupied by Sears. The Union complied immediately and relocated its pickets on the public sidewalks nearest to the Sears-occupied property, a distance in excess of 200 feet from the Sears store. At this distance, the pickets were generally out of view of the shopping public, and as a result the picketing program was terminated as ineffective on November 12, 1973. A preliminary injunction, in substantially the same form as the temporary restraining order, issued on November 21, 1973.

The California Court of Appeal twice affirmed the issuance of the preliminary injunction (See Petition, Appendices B and D, pp. A4, A15). The California Supreme Court ultimately re-

versed, holding that federal law pre-empted state court jurisdiction over the labor dispute under *San Diego Building Trades* v. *Garmon*, 359 U.S. 236 (1959), in that the Union picketing enjoined by the superior court was arguably protected by Section 7 or prohibited by Section 8 of the amended Labor Management Relations Act (hereinafter "the Labor Act") and therefore within the exclusive jurisdiction of the National Labor Relations Board. (See Petition, Appendix E, p. A31.)

At no time did Sears seek relief under the Labor Act, either by filing unfair labor practices charges, petitioning for an election, or otherwise.

ARGUMENT

A. The Same Result Below Would Be Reached On Independent State Grounds.

Notwithstanding the *Garmon* doctrine of federal pre-emption, the state of California, both by action of the Legislature and judicial doctrine, has exempted labor disputes from state trespass laws. California Penal Code Sections 602, 552.1; *Schwartz-Torrance Investment Co.* v. *Bakery and Confectionary Workers, Local 31*, 61 Cal.2d 766 (1964); *In re Zerbe*, 60 Cal. 2d 666 (1964); *Musicians Union Local No. 6* v. *Superior Court*, 69 Cal.2d 695 (1968).

In *Schwartz-Torrance*, 61 Cal.2d at 769, the California Supreme Court noted that the state Legislature had "specifically subordinated the rights of the property owner to those of persons in lawful labor activities," citing *In re Zerbe*, 60 Cal.2d at 668, and that this legislative act was entirely consistent with the public policy of the state of California as expressed in Labor Code Section 923.

Earlier, the California Supreme Court had construed Labor Code Section 923 to justify a policy of judicial abstention with respect to labor disputes. *Messner* v. *Journeymen Barbers etc. International Union*, 53 Cal.2d 873, 4 Cal.Rptr. 179 (1960); *Petri Cleaners* v. *Automotive Employees etc.*, 53 Cal.2d 455, 2 Cal.Rptr. 470 (1960). In both *Messner* and *Petri* the court refused to interfere in intrastate labor disputes on the ground that the public policy of the state as reflected in Section 923 favored the resolution of labor disputes by the free interaction of economic forces, without judicial interference, *Messner*, supra, at 880; and also because California had no "little Taft-Hartley Act" with which to evaluate the merits of labor disputes or order elections. *Messner*, supra at 882, *Petri*, supra at 474.

B. The Court Below Correctly Interpreted the Decisions of This Court in Holding That Trespass Is Not an Exception to the *Garmon* Doctrine.

(1) In *Garmon*, this Court declared that both state and federal courts must yield to the exclusive competence of the National Labor Relations Board in any matter arguably protected or prohibited under the Labor Act. State courts would, however, continue to have jurisdiction over activities of "merely peripheral concern" to the Labor Act or involving conduct which "touches interests so deeply rooted in local feeling and responsibility," that the states are not deprived of the power to act. 359 U.S. at 243-244. Picketing is undeniably a protected activity, *Garner* v. *Teamsters Union*, 346 U.S. 485, 500 (1953), and as such is not subject to state court jurisdiction.

Nor would a "trespass exception" to *Garmon* foreclose the hiatus described by Chief Justice Burger in *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 227 (1970) (concurring opinion).

and urged upon this Court by Petitioner. (Petition, p. 8.) Indeed, the reverse may be true in such states as California, as an employer would be afforded no greater legal redress to protect his private property rights than he now enjoys, by virtue of California Penal Code Sections 602 and 552.1 as judicially construed. See, *In re Zerbe*, supra; *Schwartz-Torrance*, supra; *Musicians Union Local No. 6*, supra. In other states (See Petition, pp. 6-7 fn. 2), "trespassory" labor organization picketing, which is the subject of this action, might be prohibited or restrained. Thus the diversity of application of state trespass laws to labor organizations would exacerbate the very hiatus which Petitioner claims to fear.

(2) This Court has dealt with the claim of a "trespass" exception to *Garmon* on numerous occasions and the issue is well settled. In *N.L.R.B.* v. *Babcock and Wilcox*, 351 U.S. 105, 112 (1956), this Court held that where the rights granted workers under authority of the national government—here section 7 of the Labor Act—compete with private property rights, then "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." In addition, this Court emphasized, "the determination of the proper adjustments rests with the Board." *Id.* at 112. This holding has been reaffirmed as recently as 1975 in this Court's decision in *Hudgens* v. *N.L.R.B.*, 424 U.S. 507, 521 (1975), in which this Court observed that while both *N.L.R.B* v. *Babcock and Wilcox*, supra, and *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539 (1971) involved labor organizational activities, other section 7 rights "may or may not be relevant in striking the proper balance." *Hudgens*, supra at 521. In reaching this accommodation, this Court again held "the primary responsibility . . . must rest with the Board in the first instance." *Id.*

Clearly, to allow a State Court to apply local trespass laws would vitiate the rationale of *Hudgens* which reaffirms this Court's holding that it is the N.L.R.B. and not the States which must strike the balance between section 7 rights and property rights. As the California Supreme Court itself observed in *Messner*, supra, state courts are ill-equipped to make the kinds of determinations required by the Labor Act. 52 Cal.2d at 882-883. The lack of appropriate apparatus or simply an erroneous decision by the State Court could result in the substantial denial of rights the N.L.R.B. recognizes, considers, and may find dispositive. See Cox, "Labor Law Preemption Revisited," 85 Harv.L.Rev. 1337, 1361-1362 (1972). The mandate of accommodating "the employer's business and proprietary interests against the need for organizational and strike opportunities is peculiarly an N.L.R.B. function," Cox, at 1362, and should continue to remain so.

(3) Under the recent decision of *Machinists and Aerospace Workers* v. *W.E.R.C.*, ... U.S. ....., 44 U.S.L.W. 5026 (1976), this Court noted that cases involving federal preemption fall into one of two categories. The first is where one forum would enjoin as illegal certain conduct which the other forum would find legal. The second is where State Courts would restrict the exercise of rights guaranteed by federal acts. *Auto Workers* v. *Russell*, 356 U.S. 634, 644 (1958). The first category is specifically contemplated by *Garmon* and its history summarized in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 290-291 (1971). See *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5028.

The latter category addresses itself to situations where the conduct involved should be unregulated and left to the "free

play of economic forces." *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra at 5028; *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971); Lesnick, "Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*," 72 Col.L.Rev. 469, 478, 480 (1972). Assuming, *arguendo*, that trespass is neither a protected nor prohibited activity, there still remains the question whether "Congress occupied the field and closed it to State regulation." *Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964). There can be little doubt that to permit an exception of trespass to the doctrine of federal preemption would seriously disrupt the balance of economic weaponry currently available to each side. *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5030. This view has been maintained since 1953, where this Court in *Garner* v. *Teamsters Union*, supra, at 500, declared:

> "[I]t is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the State were to declare picketing free for purposes or by methods which the federal act prohibits."

In *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5030, this Court delineated the focus of the inquiry regarding preemption, when self-help economic activities were employed, to be whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1968).

Picketing has long been recognized as a labor organization's primary economic weapon. *Garner*, supra; *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra; *Hudgens*, supra. To deprive the Union of the right to picket at the only location where it

might have an effect—the place of the involved business—would be to deny "to one party to an economic contest a weapon that Congress meant him to have available." *Machinists and Aerospace Workers* v. *W.E.R.C.*, *supra* at 5031; Lesnick, *supra* at 478.

CONCLUSION

For all the foregoing reasons, San Diego District Council of Carpenters respectfully prays that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CALIFORNIA LABOR CODE

* * *

DIVISION 2. Employment Regulation and Supervision

* * *

Part 3. Privileges and Immunities

Chapter 1. Contracts Against Public Policy

§ 923. Public policy as to labor organizations and collective bargaining

In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Enacted 1937

APPENDIX B

APPENDIX B

CALIFORNIA PENAL CODE

* * *

Title 13. Crimes Against Property

* * *

Chapter 12. Unlawful Interference With Property

Article 1. Trespassing or Loitering near Posted Industrial Property.

* * *

§ 552.1 Labor union activity: Investigation of working conditions

(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof.

(b) Any lawful activity for the purpose of investigation of the safety of working conditions on posted property by a representative of a labor union or other employee group who has upon his person written evidence of due authorization by his labor union or employee group to make such investigation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO DISTRICT COUNTY COUNCIL OF CARPENTERS,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO DISTRICT COUNTY COUNCIL OF CARPENTERS,

Respondent.

REPLY TO BRIEF IN OPPOSITION

The Respondent's brief in opposition raises for the first time several arguments against the grant of certiorari. None of these new contentions has merit for the reasons discussed below.

1. The Respondent argues, based on the California Penal Code and decisions of the California Supreme Court, that the decision below "*would* be reached on independent state grounds." Br. in Opp., pp. 4-5. (Emphasis added.) This assertion is neither true nor relevant. The California Court of Appeals twice expressly rejected the very same contention (Pet. App. B, p. A13; Pet. App. D, p. A30) and the California Supreme Court did not even comment on this conclusion. Pet. App. E, p. A23.

The court below, moreover, expressly predicated its opinion solely on a federal ground, *i.e.*, ". . . that federal law preempts both state and federal court jurisdiction of the controversy at hand . . . " *Ibid.*

2. The Respondent also argues that the question presented is "well settled" by decisions of this Court. Br. in Opp., pp. 6-7. However, none of the cases relied upon—*N. L. R. B.* v. *Babcock & Wilcox*, 351 U.S. 105 (1956); *Hudgens* v. *N. L. R. B.*, 424 U.S. 507 (1976); and *Central Hardware Co.* v. *N. L. R. B.*, 407 U.S. 539 (1972)—involved a pre-emption issue. Rather, in each case the dispute centered on the proper rule to be applied by the National Labor Relations Board to union activity on private property and not, as here, on the entirely separate issue of whether state courts retain jurisdiction to enjoin such activity. The latter question, as acknowledged by the court below (Pet. App. E, pp. A40-41, and A46, n. 8), remains unanswered by this Court and a matter of substantial controversy among the States. See Pet., pp. 4-8.

3. Finally, the Respondent argues that even if state jurisdiction is not preempted under the *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), rule, the only basis for preemption found by the court below (Pet. App. E, p. A44), it would still be preempted by reason of Congressional occupation of the field which contemplates the "free play of economic forces". Br. in Opp., pp. 7-9, citing *Machinists & Aerospace Workers* v. *W. E. R. C.*, ... U.S. ....., 92 LRRM 2881 (1976). As noted in that case (92 LRRM at 2882-2883, ns. 2 and 3), the Labor Act did not divest the States of jurisdiction to regulate some of the weapons that may be utilized by the parties to a labor dispute. See Pet., pp. 10-11. State jurisdiction remains permissible in situations, like the instant trespass controversy, which involve areas of traditional local concern controlled by a state law of general application.

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR SEARS, ROEBUCK AND CO.

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OPINIONS BELOW

The opinion of the California Superior Court for the County of San Diego is unreported and is reprinted as Petition Appendix (hereafter "Pet. App.") A. The initial decision of the California Court of Appeal, Fourth Appellate District, is reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975), and is reprinted as Pet. App. B. The order of the Supreme Court of California granting a hearing and retransferring the case back to the Court of Appeal is not reported and is reprinted at Pet. App. C. The subsequent opinion of the California Court of Appeal is reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975), and is reprinted at Pet. App. D. The opinion of the California Supreme Court is reported at 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603, and is reprinted as Pet. App. E.

JURISDICTION

The opinion and judgment of the Supreme Court of California both issued on September 2, 1976. Pet. App. E. This judgment is final for purposes of review by this Court. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551-52 (1944). This Court thereafter granted the petition for writ of certiorari on February 28, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Are state courts preempted by the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* (hereafter "the NLRA"), from framing and enforcing an injunction aimed narrowly at trespassory union activities on private property?

STATUTES INVOLVED

The relevant provisions of the NLRA and the California Penal Code, Calif. Code Ann. § 602, are reprinted as Pet. App. F.

STATEMENT OF THE CASE

Sears, Roebuck and Co. (hereafter "Sears") owns and operates a retail department store in Chula Vista, California. The store building stands by itself in the center of a rectangular-shaped piece of land. Walkways abut the building, and these in turn are surrounded on three sides by a parking area and on the fourth side by a blockwall fence that separates private dwellings from the store property. This property is posted against use by other than Sears' customers and against solicitation, distribution of handbills or other activity by non-employees. The Sears' property is surrounded by a wide public sidewalk, as well as curbs at the street, where those present are in full view of persons entering the Sears' store. App. pp. 15, 19, 21.

On October 26, 1973, the San Diego County District Council of Carpenters (hereafter "the Union") established a picket line, consisting of five pickets, on three of the private walkways adjacent to the store to protest the fact that Sears was having carpentry work performed by carpenters who had not been dispatched from the Union's hiring hall. Sears notified the pickets that they were on private property, requested that they leave the property immediately, and suggested that they picket on the adjacent public sidewalks. The pickets did leave, but all of them returned a short time later, and the picketing continued on Sears' property until the state court restraining order described below issued. App. p. 10. The Union's asserted position was that it "would not leave the store property unless legal action compelled them to leave." App. p. 14.

After it became apparent that the pickets would not leave voluntarily, Sears sought an injunction in the San Diego County Superior Court. That court issued a temporary restraining order on October 29, 1973, and a preliminary injunction on

November 21, 1973, enjoining the Union, its agents, representatives and members from picketing on Sears' property. Both orders expressly permitted picketing on the adjacent public property. Pet. App. A, pp. A2 and A3. Accordingly, on October 29, the pickets moved to the public sidewalks where, according to the California Court of Appeal, "Union sympathizers saw the pickets and refused to cross the lines . . ." Pet. App. A, p. A16. See also App., pp. 15-16. The picketing ceased on November 12, 1973. Pet. App. E, p. A33.

An appeal was taken by the Union to the California Court of Appeal which on two occasions affirmed the issuance of the injunction. Pet. Apps. B. and D. The Court of Appeal noted that a state court is not preempted from adjudicating matters "deeply rooted in local feeling and responsibility", and concluded that this "rule applies equally to trespass. The values of real property and one's right to peaceful possession and control over it, though certainly not absolute, are basic in our state and are deeply rooted in local feeling and responsibility." Pet. App. D., p. A20 (citations omitted). The California Supreme Court, however, reversed. It held that "federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board . . . and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property." Pet. App. E, p. A33. The Court considered that it was bound by this Court's "most recent ruling", *viz.*, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), which "precludes state court jurisdiction over the labor dispute before us." *Id.* at p. A44.

SUMMARY OF ARGUMENT

The National Labor Relations Act does not preempt "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act". *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 244 (1959) (footnote omitted).

Valid proscriptions on trespass are part and parcel of the states' "deeply rooted" interest in and responsibility for protecting the property of their citizens. Indeed, the very foundation of the common law system was society's desire to channel disputes over property into a judicial forum. In the absence of appropriate state authority, a property owner would be relegated to self-help remedies and the inevitable risk of physical confrontation and violence. The states' responsibility to maintain peace and order, accordingly, requires the power to enforce otherwise valid trespass laws. The NLRA was enacted against the backdrop of such laws, and, in the absence of congressional indication to the contrary, this historic area of local responsibility should not be disturbed.

Concurrent jurisdiction has been permitted in the past, and is required, where, as here, no remedy would otherwise exist for the victim of a civil wrong. A person, whether he be a property owner, as in this case, or a union member (*Vaca* v. *Sipes*, 386 U. S. 171 (1967)) cannot be denied his otherwise valid rights through the denial of a forum. If the decision below is affirmed, there would be absolutely no restraint upon even patently unlawful intrusions by union representatives upon private property. On the other hand, concurrent jurisdiction, while providing a forum for property owners, also would provide full protection for the rights of the unions, if any, to enter

upon private property. Such a right exists only in rare circumstances, and, when present, may be fully enforced by the state courts as they have historically done in related contexts. There is no reason to assume that the state courts would not fully enforce a union's right in the appropriate, exceptional circumstances. In fact the self-restraint and expertise of the state courts are substantial components in the implementation of national labor policy. See, *e.g.*, *Linn* v. *Plant Guards, Local 114*, 383 U. S. 53 (1966); *Farmer* v. *Carpenters, Local 25*, ... U. S. ....., 97 S. Ct. 1056 (1977); *Vaca* v. *Sipes, supra; Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers* (hereafter "*Letter Carriers*") v. *Austin*, 418 U. S. 264 (1976); *National Labor Relations Board* v. *The Boeing Company*, 412 U. S. 67 (1973). Even if a state court should err, unions may seek relief from the National Labor Relations Board, which, if appropriate, would include a federal district court injunction restraining the property owner and the state courts. Thus, concurrent jurisdiction would obviate the creation of an undesirable "no law area" (*Taggart* v. *Weinacker's*, 397 U. S. 233 (1970)), and still protect the rights of both the property owners and unions."

ARGUMENT

I.

THE GARMON DOCTRINE DOES NOT PREEMPT A STATE COURT FROM ENFORCING ITS TRESPASS STATUTE AGAINST UNION AGENTS ON PRIVATE PROPERTY.

In *Garmon*, this Court established the general rule that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. at 245. "On the other hand, because Congress has refrained from providing directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . .' *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289 (1971)." *Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1061 (1977). *Garmon* itself, for example, set forth various exceptions to the general rule of preemption. One of those exceptions pertains to activity, which, as here, "touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S. at 244.[1]

1. No such "compelling congressional direction" exists in this case. The little guidance that exists in the legislative history of the NLRA indicates an intention not to preempt state laws where such laws affect "deeply rooted" state interests. See, *e.g.*, *Legislative History of the Labor Management Relations Act*, 1947, Vol. II at 941 (93 Cong. Rec. 1884, 1885), where Sen. Morse discussed "mass picketing":

> ". . . I am inclined to think that as far as a legislative remedy for its abuses is concerned it is one which should be solved

(Footnote continued on next page.)

A. The Protection of Private Property from Trespass Is An Interest Deeply Rooted in Local Feeling and Responsibility.

One of the principles most firmly embedded in Anglo-American law, dating back to the origins of the English common law, is that the unauthorized entry upon the land of another is a trespass.[2] While political philosophers may have long argued over the proper structure of government, most have agreed that a basic objective of government is the protection of its citizens and their property. The thrust of legal development has been to eliminate physical confrontation over property and to replace such combat with legal forums and governmental protection. John Locke, for example, affirmed this objective in his *Treatises on Government (Second Treatise)*, at § 87 (1690):

> "no Political Society can be, nor subsist without in itself the Power to preserve the Property, and in order thereunto punish the offenses of all those of that Society . . ."

Governour Morris reiterated this historic government interest in the protection of private property by drawing on Rousseau's

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> primarily by State legislation. . . . I think it is a matter which falls primarily within the province of the police powers of the State rather than within any of the delegated powers of the Federal Government."

Cf. *Dept. of Social Service* v. *Dublino*, 413 U. S. 405, 414 (1973) ("If Congress intended to preempt state plans and efforts in such an important dimension . . . such intentions would in all likelihood have been expressed in direct and unambiguous language."), and *Lodge 76, etc.* v. *Wisconsin Employ. Rel. Com.*, 427 U. S. 132 (1976) (Burger, C. J., and Powell, J., concurring).

2. Restatement (Second), Torts, Sec. 158 (One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, ...); 75 Am. Jur. 2d *Trespass* § 10, p. 14 (1964) ("Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used . . ." footnotes omitted); *State* v. *Quinnell*, 277 Minn. 63, 151 N. W. 2d 598 (1967) (criminal conviction of picket trespassing on private property for purposes hostile to the owner upheld).

Social Contract for his statements to the Constitutional Convention in 1787:

> "An accurate view of the Matter would nevertheless prove that property was the main object of Society. The savage State was more favorable to liberty than civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular government."[3]

Private property rights not only are protected by the states, they also are "protected by the Fifth and Fourteenth Amendments" to the Constitution. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 552-53 (1972). The states, as a result, are even precluded from invoking their own constitutions to engage in an unwarranted infringement of property rights. See, *e.g.*, *Lenrich Associates* v. *Heyda*, 264 Or. 122, 504 P. 2d 112 (1972); *Diamond* v. *Bland*, 11 Cal. 3rd 331, 113 Cal. Rptr. 468, 521 P. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974).

This principle of government protection of private property is firmly embedded in the common law of this country. Every state has a statute or statutes which, like § 602 of the Calif. Penal Code, regulate such conduct and prescribe civil and/or criminal trespass sanctions. See Appendix A hereto. "The protection of private property . . . through trespass laws" is thus "historically a concern of state law". *Taggart* v. *Weinacker's*, 397 U. S. 233, 227 (1970) (Burger, C. J., concurring). Appropriate remedies, whether criminal or civil, have been afforded whenever conduct involved unwarranted entry upon the property of another, even though such conduct concerned, as here, activities by labor unions.[4] State trespass laws, after

3. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 244 (1969).

4. See, *e.g.*, *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7 (1976); *People* v. *Bush*, 39 NY 2d 529, 349 N. E. 2d 832 (1976); *Taggart* v.

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all, reflect a neutral public policy; they do not seek to accommodate "the special interests of employers, unions or the public in areas such as employee self-organization, labor disputes, or collective bargaining." *Lodge 76, etc.* v. *Wisconsin Employment Relations Committee*, 427 U. S. at 156 (Burger, C. J., and Powell, J. concurring).

The states' interest in, and responsibility for, protecting private property rights inextricably flow from the "overriding state interest . . . in the maintenance of domestic peace." *Association of Journeymen* v. *Borden*, 373 U. S. 690, 693 (1963). This responsibility is not limited merely to preventing the continuance of violence or threats thereof; it also involves preventing possible breaches of the peace or public disorders which are likely to result from the unauthorized invasion of another's property. The function of trespass actions in preventing such occurrences has long been recognized.

> "When a person refuses to leave another's property after he has been ordered to do so, a threat of violence becomes imminent. It was for this reason that the legislature made this type of trespass subject to criminal prosecution. *The basic purpose of the statute is the prevention of violence or threats of violence.*" (Emphasis added.)

People v. *Goduto*, 21 Ill. 2d 605, 609, 174 N. E. 2d 385, 387 (1961), *cert. den.* 368 U. S. 927. The corollary of the foregoing conclusion, reiterated recently by the Illinois Supreme Court, is that "an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate property rights." *May Department Stores* v. *Teamster Local No. 743*, 64 Ill. 2d 153, 162, 355 N. E. 2d 7, 10 (1976). There is, of course, as this Court has emphasized, a "deeply rooted" interest of the states in protecting their citizens against such

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Weinacker's, 283 Ala. 171, 214 So. 2d 913 (1968); *Moreland Corp.* v. *Retail Store Union*, 16 Wis. 2d 499, 114 N. W. 2d 876 (1962); and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S. W. 766 (1964).

threats of violence.[5] This Court has never questioned that state courts are free, notwithstanding the NLRA, to exercise their "historic powers over such traditionally local matters as public safety and order . . ." *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1941).

B. This Court Has Consistently Created Exceptions to the Garmon Doctrine Which in Principle Are Identical to the Instant Case.

A determination in this case that state courts are not preempted would be neither novel nor uncommon. In *Linn* v. *United Plant Guard Workers*, 383 U. S. 53, 62 (1966) for example, this Court noted that in several decisions of the Court "the 'type of conduct' involved, *i.e.*, intimidation and 'threats of violence' affected such compelling state interests as to permit the exercise of state jurisdiction." From the perspective of a State's interest "in protecting its citizens" (*Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1063) it is of no consequence whether a threat or intimidation results from a malicious libel as in *Linn;* "overt" threats of violence (*United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1955); the "outrageous conduct" of union officials (*Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1064); or a picket's provocative disregard for the rights of others. See *May Department Stores* v. *Teamsters*, 64 Ill. 2d at 162, 355 N. E. 2d at 10. In each instance, the potential for "interference with the federal regulatory scheme" is insufficient to counterbalance the legitimate and substantial interest of the states. *Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1065. Indeed, in the present case where, as discussed *infra* at p. 14, an illegal trespass would result in

5. See, *e.g.*, *International Union, U. A. A. & A. I. W.* v. *Russell*, 356 U. S. 634 (1957); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1953); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1941); and *United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1955).

the absence of any legal remedy, if the decision below is sustained, there are arguably even more compelling circumstances than in other violence cases where the Court found that a federal remedy existed but was inadequate. Here, as in *International Union, U. A. A. & A. I. W.* v. *Russell*, 356 U. S. 634 (1958) and *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954), "Congress has neither provided nor suggested any substitute for traditional State court procedure. . . ." 347 U. S. at 663-664. There is, accordingly, no reason to assume that Congress desired to "remove the backdrop of state law that provided the basis" against which the NLRA was enacted. *Taggart* v. *Weinacker's*, 397 U. S. at 227-28. (Burger, C. J., concurring.)

Moreover, as in *Farmer* and *Linn*, there is no material countervailing factor to preclude state jurisdiction. The remedy afforded by the state courts would only conflict with rights existing under the NLRA in "rare cases" (Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev., 552, 553 (1970)) or, as one union counsel has phrased it, "exceptional circumstances".[6] Unions do not possess an inherent right to be on private property.[7] The NLRA

6. See SCHLOSSBERG (General Counsel, United Automobile Aerospace and Agricultural Implement Workers of America (UAW)), ORGANIZING AND THE LAW, A HANDBOOK FOR UNION ORGANIZERS 40 (1967).

> If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so without the protection of the Labor Act. The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. There is, however, no section of the Taft Hartley Act available to the employer in this situation.

7. See, *e.g.*, *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539; *The Falk Corporation*, 192 N. L. R. B. 716, 719, 722, 723 (1971) (employer not guilty of unfair labor practice in denying union

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"does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching [their desired audience]" *N. L. R. B.* v. *United Steelworkers of America*, 357 U. S. 357, 364 (1958). Rather, it is only the extraordinary situation in which no other reasonable alternative channels of communication are available that such a right exists.[8] In that instance,

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organizers entrance to its private property; *Babcock* held controlling); *GTE Lenkurt, Incorporated*, 204 N. L. R. B. 921, 922 (1973) (off-duty employees not allowed access to their employer's premises for organizational purposes); *Kimbell Corporation*, 177 N. L. R. B. 828, 831, 832 (1969) (forceful eviction of union organizer from employer's store upheld); *J. H. Rutter-Rex Mfg. Co.*, 164 N. L. R. B. 5, 12, 13 (1967) *enforced in part, remanded in part*, 415 F. 2d 1133 (6th Cir. 1969) (*Babcock* held controlling in finding of no unfair labor practice in removal of union representative from employer's property.)

8. In this case, for example the Union could have safely and effectively picketed, as it eventually did, on the public sidewalks adjacent to the Sears' store. Both this Court and the National Labor Relations Board have recognized that such means of communication are an effective alternative. See, *e.g.*, *Central Hardware* v. *NLRB*, 407 U. S. 539 (1972); *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972); *S. E. Nichols of Ohio*, 200 N. L. R. B. 1130. As the California Court of Appeal noted:

> The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately-operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is nothing in the facts presented here to suggest in the balancing of respective interests the property owner *must* yield to the Union.

Pet. App. D, p. A29. (emphasis the Court's; footnote and citations omitted.)

whenever the necessity for a minimal "yielding" of property rights is required, the state courts are fully competent to recognize that necessity and abide by the federal law as construed by the National Labor Relations Board, the courts of appeals and this Court.

II.

CONCURRENT JURISDICTION IS ALSO REQUIRED WHERE NO FEDERAL REMEDY OTHERWISE EXISTS.

A. If Denied Access to State Courts, An Owner Has No Remedy for Illegal Trespass.

The decision of the Supreme Court of California, if affirmed, would for a property owner "inflexibly bar a hearing" and perhaps force him to "deliberately commit an unfair labor practice." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325-28 (White, J. dissenting). While "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises" (*Taggart* v. *Weinackers*, 397 U. S. at 227 (Burger, C. J., concurring)), the *Garmon* rule would nevertheless be invoked to "blindly preempt other tribunals". *Motor Coach Employees* v. *Lockridge*, 403 U. S. at 326 (White, J., dissenting). The property owner would thus be forced to choose between either tolerating what could well be unlawful trespassory picketing on his property or risk the commission of an unfair labor practice by expelling the pickets. In addition, by utilizing self-help, not only is the property owner forced to subject himself "to a Board remedy but also to tort suits. That result is . . . undesirable. . . ." Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. R. 1435, 1444 (1970). This choice, which "denies the employer a day in court" is "an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err. . . ." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972). It constitutes a

remedial vacuum which "aggravates the State's concern . . ., encourages the victim to take matters into his own hands" and thus "vitiates the ordinary arguments for preemption." *Linn* v. *Plant Guards, Local 114*, 383 U. S. at 64, n.6.

This denial of process also contravenes a "basic concept of fundamental fairness." *Motor Coach Employees* v. *Lockridge*, 403 U. S. at 327 (White, J., dissenting). The absence of a forum to adjudicate the validity of a trespass necessitates that there be concurrent jurisdiction in the state courts; "no later hearing and no damage award . . . can undo the fact that an arbitrary taking . . . has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" *Fuentes* v. *Shevin*, 407 U. S. 67, 82 (1972) (citation omitted). Denying a property owner a judicial remedy emasculates that owner's right to control his property. It is no different a situation, in effect, than if the state had created an easement on the owner's property for public use without just compensation. See, *e.g.*, *Lloyd Corporation* v. *Tanner*, 407 U. S. at 567-570; *Lenrich* v. *Heyda*, 504 P. 2d at 115; Comment, *Recent Cases*, 86 Harv. L. Rev. 1592 (1973).

The additional ramifications of preempting the application of state trespass laws are wholly undesirable. If the decision below is affirmed, notwithstanding what location a union selects to engage in its activities, Sears and all other owners would be unable to obtain relief. Yet there is no dispute that a union's right to enter on private property is limited; a union, for example, would not be entitled to maximize its pressure by picketing inside a store or even in all cases inside a shopping center. See, *e.g.*, *Marshall Field & Co.* v. *N. L. R. B.*, 200 F. 2d 375 (7th Cir. 1952); *S. E. Nichols of Ohio*, 200 NLRB 1130, 1132 (1972). Nevertheless, a union, under the "no-man's land" created by the California Supreme Court, could picket inside the Sears' store and be entirely insulated from any judicial or administrative authority even though such conduct would be

both violative of state law and unprotected under federal law. A union could, for example, trespass on private property with impunity to engage in organizational activities notwithstanding that it may have no right to do so under *N. L. R. B.* v. *Babcock & Wilcox, supra,* and *Central Hardware* v. *N. L. R. B., supra.* Many similar problems would arise if the decision below is affirmed. See *Motor Coach Employees* v. *Lockridge,* 403 U. S. at 506 (White, J., dissenting). Congress, it is submitted, did not intend "to confer upon unions such unlimited discretion to deprive injured . . . [owners] of all remedies" (*Vaca* v. *Sipes,* 386 U. S. 171, 186) through the denial of an owner's fundamental, indeed constitutional, right to a hearing.[9]

B. Concurrent Jurisdiction Would Not Deprive the Union of a Remedy.

If a property owner's efforts to restrict union activity were, in fact, unlawful under federal law, a union would not be left without a remedy. In contrast to the situation confronting an owner, as described above, the union could initially file a charge with the National Labor Relations Board, and the Board's General Counsel, the prosecutorial arm of the agency (see *N. L. R. B.* v. *Sears, Roebuck and Co.,* 421 U. S. 132 (1975)), would be free to seek preliminary injunctive relief in federal court under Section 10(j) of the NLRA. 29 U. S. C. § 160(j). If the state courts had already acted, any injunction could be vacated in the event the Board found in favor of the union. In "the highly unlikely event that the [state] . . . court would refuse to vacate the injunction in these circumstances, the Board could provide relief by seeking to enjoin

9. To deny an owner the opportunity to vindicate his rights denies him due process of law raising constitutional doubts as to the validity of the decision below. See p. 18, n.10, *infra.* The rules of statutory construction militate strongly against interpreting the NLRA in such a manner. See *United States* v. *Harriss,* 347 U. S. 612, 618 (1954); *American Power and Light Co.* v. *S. E. C.,* 329 U. S. 90, 107-08 (1946); *Ex Parte Mitsuye Endo,* 323 U. S. 283, 299 (1944).

the order of the state court. *N. L. R. B.* v. *Nash-Finch* (1971), 404 U. S. 138." *May Department Stores* v. *Teamsters, Local 743,* 64 Ill. 2d at 164, 355 N. E. at 12. The effect of a state court order, therefore, is only to maintain the *status quo* until such time as the union's rights, if any, are determined. Indeed, even in the absence of state court jurisdiction, an owner could resort to self-help and physically exclude a union. State court jurisdiction, therefore, would neither "present a potential conflict with Federal labor policy, nor . . . adversely affect rights granted the union by the NLRA." 64 Ill. 2d at 164, 355 N. E. 2d at 12.

There is, in addition, no reason "to assume . . . that a state will so construe its law . . ." as to conflict with a union's rights under the NLRA. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. at 746. Concurrent jurisdiction is not unusual in labor law; the states and the Board both have authority in cases involving libel (*Linn* v. *Plant Guards, Local 114, supra*), other tort actions (*Farmer* v. *Carpenters, Local 25, supra*), breach of a union's duty of fair representation (*Vaca* v. *Sipes, supra*) and, as noted above, picketing where there have been threats of violence or actual violence. *United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board, supra.* In each of these "partial preemption" situations the state courts must carefully examine each "factual setting" to determine whether the alleged conduct is either preempted or covered by state law. *Letter Carriers* v. *Austin,* 418 U. S. at 293. Similarly, under *Garmon,* the state courts must define when conduct may reasonably be deemed "arguably protected." In fact, in one situation directly related to the NLRA, this Court afforded the state courts exclusive freedom "to apply state law to such issues" because "the expertise" is more "evident in a judicial forum". *N. L. R. B.* v. *The Boeing Company,* 412 U. S. at 76-77 (1973). In short, national labor policy is heavily dependent on the self-restraint of the state courts. By the same token, it is the courts of

equity, not the Board, that have had the historic duty to accommodate conflicting statutory schemes and to delineate the limits of property rights. These tribunals have in similar contexts been summoned by this Court or required by the Constitution to accommodate state property rights and federal rights of expression. See, *e.g.*, *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308 (1968); *Franceshina* v. *Morgan*, 346 F. Supp. 833 (S. D. Ind. 1972); and *Folgueras* v. *Hassle*, 331 F. Supp. 615 (W. D. Mich. 1971). Accordingly, it is doubtful that "the Board brings substantially greater expertise to bear on these problems than do the courts." *Vaca* v. *Sipes*, 386 U. S. at 181. There is, therefore, no legitimate reason to deny a property owner his fundamental right to a hearing.[10]

---

10. In *Fuentes* v. *Shevin*, this Court succinctly emphasized the importance of the "right to be heard" (407 U. S. at 87):

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake. . . .

In the instant circumstances the owners would in fact succeed on the mertis in all but the rare or exceptional cases. See p. 12, *supra*. Surely then, the foregoing rationale requires a similar result here.

CONCLUSION

For the foregoing reasons, Sears, Roebuck and Co. respectfully prays that the judgment of the Supreme Court of California be reversed and that this case be remanded to that Court with instructions to assert jurisdiction.

Respectfully submitted,

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APPENDIX A

STATE CIVIL AND CRIMINAL TRESPASS STATUTES

1. Alabama—Ala. Code Tit. 14 § 426.
2. Alaska—Alaska Stat. § 11.20.610 *et seq.*, Criminal Law punishable by jail.
3. Arizona—Ariz. Rev. Stat. § 13-711 *et seq.*, Criminal Code —Misdemeanor.
4. Arkansas—Ark. Stat. Ann. § 41-4212 *et seq.*, Criminal Code—Misdemeanor.
5. California—Cal. Pen. Code § 602 *et seq.* (West), Tit. 14 Malicious Miscellaneous Trespass; prev. Tit. 13 Crimes Against Property Misdemeanor.
6. Colorado—Colo. Rev. Stat. § 18-4-502 *et seq.*, Criminal Code Offenses against Property Criminal Trespass.
7. Connecticut—Conn. Gen. Stat. Ann. § 53a-107 *et seq.* (West), Criminal Trespass.
8. Delaware—Del. Code Ann. Tit. 11 § 820 *et seq.*, Criminal Trespass 823.
9. Florida—Fla. Stat. Ann. § 821.01 *et seq.* (West), Section called "Crimes".
10. Gerogia—Ga. Code Ann. § 26-1503 and § 105-1400, Criminal Code—Criminal Trespass".
11. Hawaii—Haw. Rev. Stat. Tit. 37 § 813 *et seq.*, Penal Code—Criminal Trespass.
12. Idaho—Idaho Code § 18-7008, "Crimes and Punishment" Misdemeanor.
13. Illinois—Ill. Ann. Stat. Ch. 38 § 21-3 *et seq.* (Smith-Hurd).
14. Indiana—Ind. Code Ann. § 35-43-2-2 (Burns).

15. Iowa—Iowa Code Ann. § 810.12 *et seq.* (West), "Crimes".
16. Kansas—Kan. Stat. Ann. § 21-3721, Criminal Trespass.
17. Kentucky—Ky. Rev. Stat. Ann. § 434 B.1.060 *et seq.*, Criminal Trespass.
18. Louisiana—Law Rev. Stat. Ann. § 14.63 *et seq.* (West), Criminal Law—Criminal Trespass.
19. Maine—Me. Rev. Stat. Ann. Tit. 14 § 7551 *et seq.*, Tit. 17A, § 402 *et seq.*
20. Maryland—Md. Code Ann. Art. 27 § 57, "Crimes and Punishment".
21. Massachusetts—Mass. Ann. Laws Ch. 266 § 113 *et seq.*, (Michie/Law Co-op) Crime against property—jail term.
22. Michigan—Mich. Stat. Ann. § 28.814 *et seq.*, "Crimes" Misdemeanor.
23. Minnesota—Minn. Stat. Ann. § 609.60 *et seq.* (West), Criminal Trespass.
24. Mississippi—Miss. Code Ann. § 95-5-1, 97-17-85 *et seq.*, Criminal Trespass.
25. Missouri—Mo. Ann. Stat. § 537.330, 560.447 *et seq.* (Vernon), Criminal Trespass—Misdemeanor.
26. Montana—Mont. Rev. Code Ann. § 94-6-203 *et seq.*, Criminal Trespass.
27. Nebraska—Neb. Rev. Stat. § 28-588 *et seq.*, Criminal Trespass.
28. Nevada—Nev. Rev. Stat. § 207.200 *et seq.*, Miscellaneous Crimes—Misdemeanor.
29. New Hampshire—N. H Rev. Stat. Ann. § 635.2 *et seq.*, Criminal Trespass.
30. New Jersey—N. J. Stat. Ann. § 2A:63-1 (West), § 2A: 170-31, *et seq.*, Criminal Trespass—Civil Trespass.
31. New Mexico—N. M. Stat. Ann. § 40A-14-1 *et seq.*

32. New York—N. Y. Penal Law § 140.00 *et seq.* (McKinney), Criminal Trespass.
33. North Carolina—N. C. Gen. Stat. § 14-126, 14-160 *et seq.* Criminal Trespass.
34. North Dakota—N. D. Cent. Code § 20.1 *et seq.*
35. Ohio—Ohio Rev. Code Ann. § 2911.21 (Page), Criminal Trespass.
36. Oklahoma—Okla. Stat. Ann. Tit. 21 § 1351, 1768, "Crimes Against Property" Misdemeanor.
37. Oregon—Or. Rev. Stat. § 164.245 *et seq.*, Criminal Trespass.
38. Pennsylvania—Pa. Cons. Stat. Ann. Tit. 18 § 3503 *et seq.* (Purdon), Criminal Trespass.
39. Rhode Island—R. I. Gen. Laws § 11-44-1 *et seq.*, Criminal offenses.
40. South Carolina—S. C. Code, "Crimes and Offenses" § 16-381 *et seq.*
41. South Dakota—S. D. Compiled Laws Ann. § 22-34-4 *et seq.*, "Crimes" not called trespass, "Malicious Misdemeanor § 22-13-15 Refusal to leave-crime", "Civil" § 40-28-5.
42. Tennessee—Tenn. Code Ann. § 39-4500 *et seq.*, "Crimes" Misdemeanor.
43. Texas—Tex. Penal Code Ann. § 30.05 (Vernon), Criminal Trespass.
44. Utah—Utah Code Ann. § 76-60-1 *et seq.*, Penal Code fines; jail.
45. Vermont—Vt. Stat. Ann. Tit. 13 § 3701 *et seq.*, "Crimes" fines; jail.
46. Virginia—Va. Code § 8-866 *et seq.*, "Civil"; § 18.1-173 *et seq.* "Crimes".
47. Washington—Wash. Rev. Cod § 9A.52.010 *et seq.* Criminal Code, Criminal Trespass.

48. West Virginia—W. Va. Code Ann. § 61-3-33 *et seq.*, "Crimes against Property", Entry upon enclosed land not called trespass.
49. Wisconsin—Wis. Stat. Ann. § 943.13 *et seq.* (West), Criminal Trespass.
50. Wyoming—Wyo. Stat. § 6-226 *et seq.*, Crimes and Offenses.

No. 76-750

Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO.

Petitioner,

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT

The citations to the opinions below and the basis of this Court's jurisdiction are set forth at pp. 1-2 of the petitioner's brief. In addition to the statutes cited at Pet. Br. 2, the following are relevant: § 527.3, California Code of Civil Procedure; §§ 552.1, 555.2, and 602(1), California Penal Code. They are set out at pp. 11-17 *infra*.

QUESTIONS PRESENTED

1. Whether consideration by this Court of the labor law preemption question raised by petitioner is appropriate when the California Supreme Court has yet to decide if the injunction sought is proper under state law and there are compelling indications that it is not.

2. Whether a state court may enjoin as a trespass peaceful, non-obstructive picketing which is arguably protected by federal law under the decisions of this Court and of the

NLRB accommodating the rights stated in § 7 of the NLRA and property rights.

STATEMENT OF THE CASE

The California Supreme Court accurately and succinctly set out the nature and sequence of the state court proceedings in this case, the underlying facts, and of the basis of its decision denying petitioner, Sears, Roebuck and Co., the relief it sought, as follows:

> "Defendant San Diego County District Council of Carpenters (Union) appeals from an order granting a preliminary injunction restraining defendant, its officers, agents, representatives and members from picketing on the property of plaintiff Sears, Roebuck & Company (Sears), but permitting them to picket on the public sidewalks adjacent to Sears' private property.
>
> "Sears operates a retail department store on property which it owns in Chula Vista, San Diego County. The store building itself is centered on the large, rectangular-shaped piece of land. Walkways abut on the building on all four sides; these in turn are surrounded by a large parking area. All of the walkways and the entire parking area are located on Sears property which on its external limits is bounded on three sides by public sidewalks and streets, and on the fourth by private residences separated from the store property by a concrete wall. Sears' store is the only building on the premises.
>
> "Defendant Union is a labor organization created for the purpose of negotiating terms and conditions of employment on behalf of certain employees in the carpentry trades.
>
> "In October 1973, the Union was informed by one of its members that Sears was having carpentry work done in its Chula Vista store. On October 24 two business representatives of the Union visited the store and determined that platforms and other wooden structures were being built by carpenters who had not been dispatched from the Union's hiring hall, that the work was covered by the master agreement between the Union and the Building Trades Council of San Diego County and that the men engaged in it came within the classification of journeymen carpenters. Later the same day representatives of the Union met with the Sears' store manager and requested that Sears either contract the work through a building trades contractor who would use dispatched carpenters, or in the alternative, sign a short form agreement obligating Sears to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters on the job. The manager indicated that he would consider the matter, but despite repeated inquiries by the Union, he never responded.
>
> "On the morning of October 26, the Union established picket lines on plaintiff's property. Pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the 'Carpenters' Trade Union.' It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic. The security manager of the store requested that the pickets be removed from Sears' private property, but the Union's business representative refused, stating that the pickets would not leave unless compelled to do so by legal action.
>
> "On October 29, Sears obtained a temporary restraining order enjoining the Union, its agents, representatives and members from picketing on Sears' property. The Union complied by removing its pickets

to the public sidewalks adjacent to, but outside of, the property. Sears claimed that while the Union was picketing on the public sidewalks, certain deliverymen and repairmen refused to cross the picket-lines to service the Sears store. The Union, on the other hand, asserted that its pickets on the public sidewalks were ineffective because they were too far away from the store. As a result, on November 12, 1973, the Union moved its pickets allegedly because of their ineffectiveness. The pickets never returned.

"On November 21, 1973, the superior court granted a preliminary injunction restraining the Union, its officers, agents, representatives and members from 'causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property. . . .' The court expressly declared, however, that 'this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, 'H' Street and 'I' Street which are adjacent to the private property of plaintiff.' This appeal followed.

"Although the Union launches several related attacks on the trial court's injunction, essentially its main contention is that the court did not have the subject matter jurisdiction of the underlying labor dispute and thus was devoid of all judicial power to enjoin the picketing. We are satisfied that this contention has merit. We shall point out that federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board (Board) and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property. Accordingly we reverse the order granting the injunction." (Pet. App. A31-A33.)

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal question in this case is whether a state court may enjoin as a trespass peaceful, non-obstructive picketing, which is arguably protected by federal law under the decisions of this Court and of the National Labor Relations Board accommodating the rights stated in § 7 of the National Labor Relations Act and property rights. The factual situation in which that question arises is such peaceful picketing by a union on privately-owned walkways at the entrance to a store which are separated from the nearest publicly-owned walkways by extensive parking lots, where the owner is the employer involved in a labor dispute with that union. Our discussion throughout will refer solely to this "generic situation." (*Hudgens* v. *NLRB*, 424 U.S. 507, 522.)

In point I of our argument we show that resolution of this question in the present context would be premature. For, the California Supreme Court has yet to decide whether the injunction is proper under *state* law, and there are compelling indications in the applicable state cases and statutes, all of which we review, that it is not. If state law would not permit either the injunction in question to continue in effect, or allow an injunction under similar circumstances to be issued in the future, no possible conflict with federal labor policy could arise. As this Court stated in *San Diego Unions* v. *Garmon*, 359 U.S. 236, 239, the question of whether the NLRA preempts state law can "not be appropriately decided until the antecedent state law question [is] decided by the state court."

In point II we show that if *Garmon* does not control the

procedural aspects of this case, it assuredly controls the merits. As petitioner points out (Pet. Br., 7), the central holding of *Garmon* is:

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (359 U.S., at 244.)

Petitioner does not, and could not, suggest that the activity here at issue is not arguably protected by the NLRA. For, the NLRB in a strikingly similar case has just ruled that the property right of the owner of the "privately owned * * * walkways * * * essentially open to the public [and] the equivalent of sidewalks" at the entrance to the store which is the scene of a labor dispute is subordinated to the § 7 "right to picket immediately in front of" the store and not at "such a distance from the focal point [of the dispute] * * * that a message announced orally or by a picket sign would be too greatly deluded to be meaningful." (*Scott Hudgens*, 230 NLRB No. 73, 95 LRRM 1351, 1354.) And, in so doing the Board was implementing this Court's mandate in *Hudgens* v. *NLRB*, 424 U.S., at 521-523. Nevertheless, Sears maintains that the states' interest in enforcing their trespass laws comes within an exception to *Garmon*, which preserves to the states the right to regulate activity which "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S., at 244.) But this Court has never recognized an exception to *Garmon* where the activity involved is arguably *protected* by federal law rather than arguably prohibited. For to do so

would be to allow "the greatest threat against which the *Garmon* doctrine guards, a state's prohibition of activity that the [NLRA] indicates must remain unhampered." (*Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 193.)

The exception to the *Garmon* doctrine which permits the states to advance interests "deeply rooted in local feeling" is applicable only where there is "no risk that permitting the state cause of action to proceed would result in regulation of conduct that Congress intended to protect." (*Farmer* v. *Carpenters*, ... U.S. ....., 45 L.W. 4263, 4265.) We conclude point II by demonstrating that in this case there is a substantial risk that enforcement by the states of their trespass laws would result in injunctions against "conduct that Congress intended to protect."

Finally, in point III we answer Sears' argument that the states should have concurrent jurisdiction over cases such as the instant one in order to assure the property owner a "remedy for illegal trespass." (Pet. Br., 14-18.) As we show: this argument is merely a restatement of the contention that the portion of the *Garmon* doctrine preempting state regulation of conduct "arguably protected" by § 7 should be overruled; and this Court has three times in the past seven years considered invitations to modify or overturn the *Garmon* doctrine and has chosen instead to "reaffirm * * * the general rule set forth in *Garmon*" (*Farmer*, 45 L.W. at 4265). We conclude this portion of our argument by noting that even if the Court were to conclude that the interest in assuring employers a forum in a case such as this should be given greater weight than it is presently afforded that conclusion does not lead to the concurrent jurisdiction rule sought by Sears. The suggestion in this regard that we develop is that at the least state

jurisdiction to enjoin alleged trespasses should be pre-empted where peaceful picketing by a union takes place on privately owned walkways at the entrance to a premises which are widely separated from the nearest publicly owned walkways, and where the owner is the employer (or his lessor) involved in a labor dispute with that union, so long as the union responds to an employer, who believes that the picketing at that location is not protected by federal law and who demands that the pickets leave, by filing a § 8(a)(1) charge against the employer with the NLRB, thereby assuring *Board* consideration of the employers' contention.

ARGUMENT

I.

1. The question petitioners seek to have this Court resolve turns on the proper application of the preemption doctrine announced in *San Diego Unions* v. *Garmon*, 359 U.S. 236. Since the doctrine announced in *Garmon* is central to this case, the circumstances preceding that decision are particularly pertinent.

The *Garmon* case was twice before this Court. As the Court explained in *Garmon I* (*San Diego Unions* v. *Garmon*, 353 U.S. 26, 28), the controversy concerned:

> "an order enjoining the unions from picketing or exerting secondary pressure in support of their demand for a union shop agreement unless and until one or another of the unions had been designated as the collective bargaining representative of respondents' employees [and] award[ing] respondents $1,000 damages."

On the basis of the companion decisions in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, and *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, the Court vacated the state

court injunction. (353 U.S., at 28-29.) But, as the Court noted in *Garmon II*:

> "[S]ince it was not clear whether the judgment for damages would be sustained under California law, [the Court] remanded to the state court for consideration of that local law issue. *The federal question*, namely, whether the National Labor Relations Act precluded California from granting an award for damages arising out of the conduct in question, *could not be appropriately decided until the antecedent state law question was decided by the state court.*" (359 U.S., at 238-239, emphasis supplied.)

The need for a definitive determination of state law in these circumstances before "[t]he federal question • • • [can] be appropriately decided" is inherent in the issues with which the *Garmon* doctrine is concerned. For, "[i]n determining the extent to which state regulation must yield to subordinating federal authority, [the Court has] been concerned with delimiting areas of potential conflict • • •" (*id.*, at 241-242)—that is, "with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered" (*id.*, at 246-247). If the state does not in fact prohibit the disputed conduct claimed to be protected by the NLRA, there is no potential for conflict, no possible interference with national labor policy, and therefore no federal question to resolve. This is the reason the Court remanded *Garmon* for a determination of state law and decided the preemption question only after it was certain that there was a possible conflict with federal law.

2. The question whether California law permits injunctions based on its trespass laws against peaceful picketing by a union in support of its position in a labor dispute and conducted upon property which, while pri-

vately owned, is open to the general public, is substantial. Indeed, respondent vigorously argued to both the California Court of Appeal and to the California Supreme Court that the injunction was contrary to state statutory and decisional law; while the Court of Appeal decided otherwise (Pet. App. A12), the Supreme Court did not address the question. Further, a new state statute (California Code of Civil Procedure § 527.3) not effective until after the Union's position was presented to the California Supreme Court and therefore not brought to the attention of either the Court of Appeal or the Supreme Court suggests that even if the injunction was valid when entered, it was improper by the time of the California Supreme Court decision.

We therefore summarize below the state of the pertinent California law, not for the purpose of *proving* that the Union's activity was not actionable under state law, since this Court could not determine that state law point in any event, but in order to demonstrate that it is quite possible —indeed, probable—that if the case were remanded to decide the "antecedent state law question" (*Garmon*, 359 U.S., at 239), it would turn out that there is no federal question in this case.

This summary is instructive also, we submit, in that it fills a void left by petitioner's brief. To support its position, petitioner discourses at length (Pet. Br., 8-11) on the basic state interest in protecting private property, and the connection of trespass law to preventing violence which might occur in support of property rights. Not surprisingly this treatise is entirely devoid of any material showing that *California* regards the protection of private *commercial* property sought here, as a basic state interest. For as we now show, California has, as a matter of state law, subju-

gated the use of private commercial property to state control to further various public interests, including the interest in free use of economic weapons in labor disputes, and created exceptions to its trespass law for that purpose.

(a) First, while petitioner presents California Penal Code §§ 602(k) and (l)[1] as the statutory basis for the injunction (Pet. App. F), those sections were not in fact violated, and the section which might otherwise be pertinent, § 602(n), contains an express exception seemingly

---

[1] Section 602 prohibits:

"(k) Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands;

(4) Discharging any firearm;

"(l) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

[2] Section 602(n), enacted in 1970, prohibits:

"(n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by a peace officer *and* the owner, his agent, or the person in lawful possession thereof." (Emphasis supplied.)

applicable to these facts.[2] While the Sears property is posted with "signs stating that solicition and distribution of handbills is prohibited without prior permission of the store manager" (App. 14),[3] there are no "signs forbidding trespass" such as are required by § 602(k), and, obviously, Sears does not require "written permission of the owner" (§ 602(k)) before permitting entry onto its property. And, § 602(l) pertains only to "entering *and occupying* real property" (emphasis supplied); this prohibition has been construed by the California courts to make clear that "occupying" does not mean merely "remaining" but, rather engaging in "a non-transient, continuous type of possession." (*People* v. *Wilkinson*, (1967) 248 Cal. App. 2d 246, 56 Cal. Rptr. 261.)[4]

Section 602(n), enacted after the other two sections, does

[3] Sears' representation that the "property is posted against use by other than Sears' customers" (Pet. Br., 3) is not accompanied by any citation to the record, and we can find no record support for the statement.

[4] "The purpose of the legislature in passing subdivision (*l*) of the trespass law is quite clear. It intended the word 'occupy' to mean a non-transient, continuous type of possession. • • • [Otherwise] many another verb could have been used in place of 'occupy' to express an intention of preventing such transient use of so small an area, e.g., be, remain, loiter, tarry, camp, stay, and probably many more. Having in mind the legislative purpose in passing subdivision (l) of Section 602, it is rather obvious that some degree of dispossession and permanency be intended.

"Certainly if transient and insubstantial use • • • is covered by Penal Code § 602(l), then many of the other subdivisions of that section, as well as the later adopted 602.5 (1961) would be unnecessary. • • • Note that 602(l) covers 'structures' as does 602.5, but that the former uses 'entering *and occupying*' and the latter uses 'enters *or remains*'." (248 Cal. App. 2d, at 249, 56 Cal. Rptr., at 264.)

prohibit "refusing to • • • leave land • • • belonging to another." But, it does not apply to land "open to the general public," as was Sears' property; and, it seemingly applies only if the person is "requested to leave by a peace officer" as well as by the owner or manager.[5] Here the Union pickets were never asked to leave by any public official.

(b) Not only is the statutory basis for the injunction mysterious,[6] but even if the pickets' actions were other-

[5] See also *In re Cox*, (1970) 3 Cal. 3d 205, 219, 90 Cal. Rptr. 24, 33, holding that state law does necessarily not forbid a person from remaining on business premises generally open to the public even if requested by the owner to leave.

[6] Another section of § 602, upon which petitioner does not rely, seems on its face to be possibly applicable but, given the interpretation of the state courts, clearly is not. Section 602(j) prohibits:

> "(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession"

In a case involving the handing out of leaflets and the display of informational placards on private property, the California Supreme Court ruled that there could be no "obstructing [of any lawful business] in the absence of any physical 'obstruction'", as long as "members of the public who wished to [engage in the business on the location] 'could do so freely.'" (*In re Wallace*, (1970) 3 Cal. 3d 289, 295, 90 Cal. Rptr. 176, 180.) Mere inconvenience to the public does not constitute obstruction. (*Id.*) (Compare *In re Ball*, (1972) 23 Cal. App. 3d 380, 100 Cal. Rptr. 189 (a violation of § 602(j) did exist where location of demonstrators was such that passengers of tram could not disembark).) Here, there is no allegation at all that the location of the pickets physically obstructed customers, employees, or delivery persons from entering and using Sear's property as usual if they wanted to, and § 602(j) is therefore not pertinent.

wise within the trespass statutes cited by petitioner they would not be unlawful because of exceptions in the California trespass laws for participants in union-employer disputes. Section 555 of the California Penal Code is a special, more stringent trespass statute applicable to certain kinds of industrial property, posted in a particular fashion; as to such property, mere entry without written permission is prohibited.[7] (See Cal. Pen. Code §§ 553, 554, & 555.) However, § 552.1 provides a specific exemption from this prohibition "for the purpose of carrying on the lawful activities of labor unions, or members thereof." (See also § 555.2) The California Supreme Court, recognizing that it would be anomalous to have a labor dispute exception to the trespass statute applicable only to property the legislature was *most* concerned to protect from unauthorized entry, has viewed § 552.1 as applicable to any trespass action not only those which would otherwise come within § 555. "[T]he legislature in dealing with trespasses has specifically subordinated the rights of the property owner to those of persons engaged in lawful labor activity." (*Schwartz-Torrance Inv. Corp.* v. *Bakery & Conf. Workers*, (1964) 61 Cal. 2d 832, 833, 40 Cal. Rptr. 233, 234;[8] see also *In re Zerbe*, (1964) 60 Cal. 2d 650, 36 Cal. Rptr. 286.[9]) Thus,

[7] In contrast as we have seen (pp. 12-13), mere entry on a commercial property without more, is not a violation of any portion of § 602.

[8] Other aspects of *Schwartz-Torrance* are based upon constitutional doctrine, overruled as to the federal constitution in *Hudgens* v. *NLRB*, 424 U.S. 507. The portion quoted in the text, however, is plainly an interpretation of statutory law.

[9] The Court of Appeal viewed § 552.1 as inapplicable to this case because it is "applicable only to posted industrial property," citing as authority for this limitation *Cotton* v. *Superior Court*,

> ..."in furtherance of the established policy of [California] to have labor conflicts settled by the free interaction of economic forces, conduct of various types has been treated as a proper means of obtaining a valid labor objective even though the conduct would be considered unlawful in the absence of a labor dispute." (*In re Zerbe*, 60 Cal. 2d, at 653, 36 Cal. Rptr., at 289.[10])

(c) Assuming that the California Supreme Court did not regard the above analysis as dispositive of whether any trespass had occurred, that court would be constrained, we believe, to rule, under a statute effective January 1, 1976, that the injunction issued was nonetheless invalid insofar as it survived after 1975, and that no similar injunction could issue in the future. For, California Code of Civil Procedure § 527.3 currently provides that:

> "[N]o court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order * * * which * * * prohibits any person or persons * * * from * * *:
>
> (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be,

(1961) 56 Cal. 2d 459, 15 Cal. Rptr. 65. (Pet. App. A12.) But that court in so holding ignored *In re Zerbe* and *Schwartz-Torrance*, both decided *after Cotton* and both holding the exemption applicable to other than posted industrial property. *Schwartz-Torrance*, indeed, involved "commercial property used for retail sales" (Pet. App. A12) as does this case.

[10] See Cal. Labor Code § 923; *Petri Cleaners, Inc.* v. *Automotive Employees*, (1960) 53 Cal. 2d 455, 2 Cal. Rptr. 470, *Messner* v. *Journeyman Barbers*, (1960) 53 Cal. 2d 873, 4 Cal. Rptr. 179.

or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers."[11]

The mandate of the statute seems plain: whether or not labor picketing is ultimately determined to be legal, California courts may not *enjoin* such picketing as long as it is peaceful and not disruptive. (See also § 527.3(e).) The legislature specified the reasons for this rule as follows:

"(a) The status quo cannot be maintained but is necessarily altered by the injunction.

• • •

(c) The error in issuing the injunctive relief is usually irreparable to the opposing party.

(d) The delay incident to the normal court of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case." (Section 1, California Stats. 1975, c. 1156.)

The broad statutory language does not state *explicitly* that it applies to picketing on private property. But it does not state otherwise, and there are several reasons why the California courts are unlikely to read such an exception into the statute.

First, subsection (1) clearly applies in some instances to private property, since it specifies that *both* patrolling "on any public street" *and* patrolling "any place where any person or persons may lawfully be" may not be enjoined. In light of the decisions in *Schwartz-Torrance* and *In re Zerbe*, it appears that the intent is to prohibit injunctions against peaceful picketing at a location, like Sears' property, open to the general public.

[11] Subsection (4) of the statute defines a labor dispute so as to make clear that the statute is applicable to the dispute between Sears and the Union.

Moreover, subsection (1) applies as long as there is no "fraud, violence or breach of the peace." The legislature could have specified trespass, but did not. (See also 527.3(e).)

Third, subsection (2), which applies particularly to picketing, has *only* the limitation that the picketing be "peaceful." Thus, it appears that even more protection from injunctions is given to picketing than to other kinds of publicity.

Finally, the legislature specifically directed that "the provisions of [the statute] • • • shall be strictly construed • • • with the purpose of avoiding any unnecessary interference in labor disputes." (§ 527.3(a).) In light of this directive and of the reasons given by the legislature for avoiding injunctions in labor disputes (see p. 16, *supra*), any doubts as to whether an asserted trespass without more would constitute an exception to the application of the statute will almost certainly be resolved against finding an exception. For, both state (see pp. 11-15, *supra*) and federal law[12] clearly permit peaceful labor picketing on private commercial property in *some* instances. Since the California legislature was particularly concerned, in enacting § 527.3, with the fact that any errors in issuing injunctions in labor disputes are not reparable, it must be taken to have intended to apply that policy to an area in which an erroneous injunction would have precisely the

[12] See pp. 23-27, *infra*.

effect feared—interfering in union activity later determined to have been proper, and thus altering beyond retrospective repair the balance of legitimate economic weapons in a labor dispute.

3. The situation, then, is that the California Court of Appeal, which did decide the state law question, relied upon a plainly superseded precedent; the California Supreme Court did not address the state law questions at all; and a statute which became effective after the Union's final brief to the California Supreme Court and which no state court considered probably renders the injunction, and similar injunctions, ineffective as to the future even if it was proper when entered.[13] To determine the question presented by petitioners while the case is in this posture could be, as *Garmon* pointed out, to resolve a possible conflict between state and federal law which may not in fact exist. Unless, upon remand, the California Supreme Court decides that the injunction issued was proper, remains proper, and would be proper if the same circumstances arose again, this case "[does] not present the threat of grave state-federal conflict that [this Court] need sit to resolve," (*Taggart* v. *Weinacker's*, 397 U.S. 223, 225).

II.

1. Recalling some history regarding the development of the current preemption law is a useful beginning to the dis-

[13] The California appelate courts, like the federal courts, in reviewing a lower court order look to the presently existing law not to the law as it stood at the time the order was issued. (See *Kash Enterprise Inc.* v. *City of Los Angeles*, (1977) 19 Cal. 3d 294, 302 n.6, 138 Cal. Rptr. 53, 61 n.6; compare, *Fusari* v. *Steinberg*, 419 U.S. 379, 387.)

cussion of Sear's contention that the states' interest in enforcing their trespass laws comes within an exception to *Garmon* which preserves to the states the right to regulate activity which "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S., at 244.)

Prior to *Garmon*, *Garner* v. *Teamsters Union*, 346 U.S. 485, had settled the point that the states cannot *enjoin* peaceful picketing regulated by the Act:

> "[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts. But experience gives no assurance of either alternative, and there is no indication that the statute left it open for such conflicts to arise.
>
> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to

condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (*Id.* at 498-500, footnote omitted.)

The open question answered in *Garmon* was whether state courts can award *damages* for peaceful picketing which is regulated by the NLRA. (See 359 U.S., at 244.) The Court divided 5-4 in ruling that the states may not through damage suits regulate peaceful picketing which is arguably prohibited. The five man majority and the four concurring Justices agreed, however, that if "the Union's actions for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, *** state action is precluded *** [and] it makes no difference [if] the Board [does not] exercise its jurisdiction." (*Id.*, at 249 (Harlan, J., with whom Clark, J., Whittaker, J., and Steward, J., joined, concurring).) The concurring Justices in *Garmon* explained why pre-emption of state jurisdiction in "arguably protected" cases is absolutely central to a uniform federal labor policy:

> "The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power." (*Id.*, at 250.)

2. From the first then it has been understood that the

primary office of the preemption doctrine is to assure that the states do not enjoin picketing arguably protected by federal labor policy. The development of the exceptions to the *Garmon* doctrine has been consistent with this understanding. Just last term Mr. Justice Powell reviewed these exceptions and stated the standard for determining when the NLRB has exclusive primary jurisdiction and when it does not:

> "[B]ecause Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions. . . ." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289 (1971). Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in *Garmon*, 359 U.S., at 244, and recently reaffirmed in both *Lockridge*, 403 U.S., at 291, and *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commission*, [427 U.S. 132] (1976).
>
> "[T]he same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. * * *
>
> "These exceptions in no way undermine the vitality of the pre-emption rule. [*Vaca* v. *Sipes*, 386 U.S. 171, at 180.] To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for intereference with the federal regulatory scheme.
>
> "The nature of the inquiry is perhaps best illustrated by *Linn* v. *Plant Guard Workers*, 383 U.S. 53. * * *

First, the Court [in *Linn*] noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 U.S., at 61, and *there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect.*

• • •

"Similar reasoning underlies the exception to the pre-emption rule in cases involving violent tortious activity. Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute, *Automobile Workers* v. *Russell*, 356 U.S. 634, 640, (1958); *id.*, at 649, (Warren, C. J., dissenting); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 666, 98 L Ed 1025, 74 S Ct 833 (1954), and *thus there is no risk that state damage actions will fetter the exercise of rights protected by the NLRA.*" (45 L.W. at 4265-4266; emphasis supplied.)

Thus, the first precondition to state jurisdiction is that there be "no risk that permitting the state cause of action to proceed would result in regulation of conduct that Congress intended to protect."

Moreover, while satisfaction of that condition is necessary to establish a *Garmon* exception it is not sufficient. In addition, as the *Farmer* Court noted, there must be:

> "little risk that the state cause of action would interfere with the effective administration of national labor policy. [In the situation presented in *Linn*, for example, the] Board's § 8 unfair labor practice proceeding would focus only on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions. *Id.*, at 63. Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award Linn relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule." (45 L.W., at 4265-4266.)

The "concerns of the federal scheme and the state tort law" must be "discrete" in the sense that the elements of the state cause of action "would play no role in the Board's disposition of a case" properly before the agency, and "[c]onversely the state court tort action can be adjudicated without resolution of the merits of the underlying labor dispute." (*Id.*, at 4267.)

3. It is patent that neither of these preconditions to state jurisdiction obtain here.

First, this is not a case in which there is "no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect" (*Farmer*, 45 L.W. at 4265). To the contrary, the decisions of this Court and the Board demonstrate that it is far more probable than not that the picketing enjoined is protected by the Act.

The NLRA regulates in detail labor disputes such as that between Sears and the Union over the carpentry work at the Company's Chula Vista store. Sections 7 & 13 safeguard the Union's right to picket to protect its "area standards" conditions. (See *Houston Building & Construction Trades Council (Claude Everett Construction Co)*, 136 NLRB 320.) On the other hand, § 8(b)(7) limits the

right to picket for recognition and § 8(b)(4)(D) prohibits picketing to force a work reassignment during a jurisdictional dispute. And, from what Sears did and did not do, the fair inference is that the Union's picketing in this case did meet the Act's requirements. For the Company sought a state court order removing the pickets to a more distant location but did not even file a charge with the Board despite the fact that a meritorious charge would lead to an order banning the picketing completely.

The Act does not merely grant a right to engage in "lawful primary economic picketing" (such as "area standards" picketing) somewhere. Rather, §§ 7 & 13 grant the precise "right to picket immediately in front of" the premises at which the labor dispute occurs and not at "such a distance from the focal point [of the dispute] *** that a message announced orally or by a picket sign *** would be too greatly diluted to be meaningful." For the pickets have the "right to communicate their message both to persons who would do business with the *** employer [involved in the dispute,] *** [a] group *** [which] bec[omes] established as such only when individual shoppers decide to enter the [employer's] store [,] *** and to [his] employees." (*Scott Hudgens*, 230 NLRB No. 73, 95 LRRM 1351, 1353-1354.)

In *Scott Hudgens* the Board ruled in certain circumstances this picketing right subordinates the property right of the owner of the "privately owned *** walkways *** essentially open to the public [and] the equivalent of sidewalks" at the entrance to a store which is the scene of the labor dispute. (*Id.*, at 1354, 1355.) In so doing the Board was implementing this Court's mandate in *Hudgens* v. *NLRB*. For, as Mr. Justice Stewart stated for the *Hudgens* Court:

> "*** Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights; 'and to seek a proper accommodation between the two.' *Central Hardware Co.* v. *NLRB*, 407 U.S., [539] at 543. ***
>
> "In the *Central Hardware* case, and earlier in the case of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court considered the nature of the Board's task in this area under the Act. Accommodation between employees' § 7 rights and employers' property rights, the Court said in *Babcock & Wilcox*, 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.' 351 U.S., at 112.
>
> "Both *Central Hardware* and *Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property.[10] The context of the § 7 activity in the present case was different in several respects which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational activity. See *Steelworkers* v. *NLRB*, 376 U.S. 492, 499; *Bus Employees* v. *Missouri*, 374 U.S. 74, 82; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 234. Cf. *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U.S. 664, 668-669. Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. See *NLRB* v. *Babcock & Wilcox Co.*, *supra*, at 111-113. Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.[11]
>
> "*** The locus of [the required] accommodation *** may fall at differing points along the spectrum de-

pending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. See *NLRB* v. *Babcock & Wilcox, supra*, at 112; cf. *NLRB* v. *Eric Resistor Corp., supra* at 235-236; *NLRB* v. *Truckdrivers Union*, 353 U.S. 87, 97. 'The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.' *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266.

> "[10] A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793. This difference is 'one of substance.' *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113.
>
> "[11] This is not to say that Hudgens was not a statutory 'employer' under the Act. See n. 3, *supra*."

(424 U.S., at 521-523.)

We believe that the instant case and *Hudgens* are alike in the essentials identified by the Board—the physical location (a shopping place separated from public thoroughfares by extensive parking lots), the type of § 7 activity involved (the exercise of the statutory right to picket an employer with whom the pickets have a labor dispute), and the adverse effect on that § 7 right of shifting the picketing from the walkways generally open to the public at the focal point of the dispute to a location so distant that the message is too greatly diluted to be meaningful. But we recognize that the Board's *Hudgens* decision on remand has not yet been "subject to review by the courts" (*Hudgens*, 424 U.S. at 521). And, we understand that as

Hudgens "was different [from *Central Hardware* and *Babcock & Wilcox*] in several respects which may or may not be relevant in striking the proper balance" (*id.*, at 522), so this case and *Hudgens* are not identical. Nevertheless we submit that the similarities are so compelling as to make it plain that this case and *Hudgens* are examples of the same "generic situation" (*id.*). It is for that reason that we say with confidence that it is far more probable than not that the picketing enjoined here is protected by the Act. And, as the Court stressed in *Garner*:

> "[T]he policy of the Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." (346 U.S. at 499-500.)

Second, as opposed to the filing of a damage suit for malicious libel or for outrageous conduct that causes grievous harm as in *Linn* and *Farmer* when an employer files a trespass action, "the state court tort action can [not] be adjudicated without resolution of the 'merits' of the underlying labor dispute," (*Farmer*, 45 L.W. at 4267). The possibility of separating the Board's function from that of the state court so that "there [is] little risk that the state cause of action would interfere with the effective administration of national labor policy [because] the [state] action can be resolved without reference to any accommodation of the special interests of unions [and employers]" (*id.*, at 4266, 4267) simply does not exist. For, in this context, there are no "discrete concerns of the federal scheme and the state *** law" (*id.* at 4267). The federal scheme encompasses a concern for property law, and subjects that concern to a balancing test against federal interests in the

course of determining the federal right. The state court would therefore have to decide the federal question *in toto* before considering the state law problem.

The attempt of the California Court of Appeal in this case to decide that question demonstrates the wisdom of the *Garmon* rule. For, that court, inexperienced in federal labor relations law, viewed *Central Hardware* as controling even though, as this Court noted in *Hudgens*, *Central Hardware* involved organizational activity rather than consumer picketing. (See 424 U.S. at 521-522.) And, that court saw no relevant distinction whatever as regards § 7 rights between picketing directly in front of a store and picketing at the entrance to a parking lot several hundred feet from the store, where consumers could only see the pickets fleetingly as they drove by. Yet, the Board in *Scott Hudgens* recognized that the distance of picketing from a store entrance can be critical to its effect, because "a message announced orally or by picket sign at *** a [substantial] distance from the focal point would be too greatly diluted to be meaningful." (95 LRRM, at 1354.)

It is no discredit to state courts to recognize that they are not familiar with federal labor policy or the distinctions relevant to its protections, and are therefore likely, as the Court of Appeal was here, to ignore critical factors and misinterpret important precedents. It is for this reason that Congress committed federal labor policy in this regard to an expert administrative agency, and it is for this reason that any exceptions to that rule must, as *Farmer* held, be limited to situations in which the uniformity of that federal policy is not endangered.

In *Hudgens* this Court declined to make the accommoda-

tion of § 7 rights and private property rights" called for by the Act, emphasizing that the "primary responsibility for making this accommodation must rest with the Board in the first instance." (424 U.S., at 522.) As Mr. Justice Frankfurter had stated in *Garmon*:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." See, e.g., *Garner* v. *Teamsters Union*, 346 U.S. 485, especially at 489-491; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468." (359 U.S., at 244-245.)[14]

[14] While we believe that two of the contentions upon which the petitioner places heavy weight are plainly insubstantial, to conclude our analysis we answer each.

First, Sears argues that under *Garmon* the states' interest in "preventing *possible* breaches of the peace or public disorders" is overriding. (Pet. Br., 10; emphasis supplied.) If that were the law the *Linn* Court would not have "held that state [libel] damage actions in [the labor] context *** escape pre-emption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity." (*Farmer*, 45 L.W. at 4266.) For the preempted portion of the state libel laws, no less than the state trespass laws governing commercial property open to the public generally, is addressed to preventing possible breaches of the peace. Nevertheless those libel laws were preempted in part to "minimize the possibility that state libel suits would either dampen the free discussion characteristic of labor disputes or become a weapon of economic coercion." (*Id.*) The considerations of federal labor policy requiring a partial preemptions of the state trespass laws are at least as weighty. And, of course, the states' authority

to deal with the use of actual force or violence by the pickets remains. As the Kansas Court of Appeals has just explained:

"In *Youngdahl* v. *Fainfair, Inc.*, 355 U.S. 131, (1957), the Supreme Court held that a state court may lawfully enjoin a union from threatening or provoking violence and from obstructing or attempting to obstruct the free use of streets adjacent to the employer's place of business, and the free ingress and egress to and from that property. However, it held that a state court cannot lawfully enjoin a union from 'all picketing or patrolling' of those premises. We believe that the answer to our problem may be found in *Youngdahl* when considered together with the other decisions of the Supreme Court which are discussed above. We have concluded that a state court has the power to enjoin trespassory picketing only where there is shown to be actual or some obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business. Unless the evidence establishes that these elements are present, a state court should not take jurisdiction in actions seeking injunctive relief in cases of peaceful trespassory picketing. Such controversies should properly be left for determination by the NLRB which has been given the authority to resolve conflicts between Sec. 7 rights and private property rights. (*Hudgens* v. *NLRB*, supra.)" (*Shirley* v. *Retail Store Employees Union*, ... Kan. ....., 95 LRRM 2817, 2821.)

This brings us to petitioner's related contention that the California Supreme Court's decision creates a "no man's land" in which unions *inter alia* "could picket inside the Sears' store." (Pet. Br. 15.) Again, *Linn* provides the answer.

The parallel to the Board cases which did not protect malicious defamation, and which justified the preservation of a state cause of action in *Linn*, is to be found in such cases as *Labor Board* v. *Fansteel Mfg. Co.*, 306 U.S. 240, and *Marshall Field Co.* v. *NLRB*, 200 F.2d 375 (C.A. 7), which held, respectively, that a sit-in at an employer's plant and union solicitation in certain areas of a department store were not protected under § 7. Even as preservation of state actions for malicious defamation was held in *Linn* to be consistent with the former set of Board cases, so state action for trespass in a *Fansteel* or *Marshall Field* situation would be consistent with federal law, and in our view, permissible. But the point

III.

In the concluding section of its brief Sears argues that the states should have concurrent jurisdiction over cases such as the instant one because "if denied access to state courts, an owner has no remedy for illegal trespass." (Pet. Br., 14-18.) That is not an argument from *Garmon* and its progeny but an argument for an overruling of the portion of the *Garmon* doctrine providing that when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . due regard for the federal enactment requires that state jurisdiction must yield." (359 U.S., at 244.) As Mr. Justice Harlan noted in his separate memorandum in *Taggart* v. *Weinacker's, Inc.*, 397 U.S., at 230:

"While I recognize THE CHIEF JUSTICE's and MR. JUSTICE WHITE's concern over the hiatus created when the Board does not or cannot assert its jurisdiction, see the concurring opinion of THE CHIEF JUSTICE, *ante*, p. 227, and the concurring opinion of MR. JUSTICE WHITE in *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, *ante*, p. 201 (decided today); see also Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), that consideration is foreclosed, correctly in my view, by *Garmon*. Congress is the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an

of *Farmer* (45 L.W., at 4266)—"that the scope of [the] exemption" granted must be "limit[ed]" to "[m]inimize the possibility" of interference with the federal scheme—is also applicable here. To allow state trespass laws to prevent picketing at the locations the federal law specifies as proper would be to frustrate the Act's determination to permit the use of that economic weapon.

> experienced agency. Where conduct is 'arguably protected,' diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to 'arguably protected activities,' until the Board has acted, even if wrongs may occasionally go partially or wholly unredressed."

In the seven years since *Taggart* this Court has on three occasions considered invitations to modify or overturn the *Garmon* doctrine. The upshot, as Mr. Justice Powell stated just last term, has been that "the general rule set forth in *Garmon*, 359 U.S., at 244" has been "recently reaffirmed in both [*Motor Coach Employees* v.] *Lockridge*, 403 U.S. [274] at 291, and *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employe Relations Comm'n.*, [427 U.S. 132]." (*Farmer*, 45 L.W. at 4265.) Justice Harlan's call to "stand by *Garmon* and foreclose state action with respect to 'arguably protected' activities" (*Taggart*, 397 U.S., at 230), seconded by his demonstration in *Lockridge* (403 U.S., at 285-291) of the compelling case for *Garmon*, has carried the day.

Sears' brief adds nothing to the debate that has not already been advanced and rejected during the searching recent reexamination and reaffirmation of *Garmon*. And, we are frank to admit that we can add nothing to the majority opinions in *Lockridge*, *Machinists* and *Farmer*. But it is worthwhile, we believe, to conclude by noting that even if the Court were to decide to treat with Sears' contention as *res nova* and to conclude that the interest in assuring employers a forum in a case such as this should be given greater weight than it is presently afforded, that conclusion

does not lead to the concurrent jurisdiction rule sought by Sears. The employers' interest in a hearing can be served without disturbing the rule that "while the Board's decision is not the last word, it must assuredly be the first" (*Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 185).

Our suggestion in this regard is that at the least state jurisdiction to enjoin alleged trespasses should be preempted where peaceful picketing by a union takes place on privately owned walkways at the entrance to premises which are widely separated from the nearest publicly owned walkways, and where the owner is the employer (or his lessor) involved in a labor dispute with that union, so long as the union responds to an employer who believes that the picketing at that location is not protected by federal law and who demands that the pickets leave, by filing a § 8(a)(1) charge against the employer with the NLRB, thereby assuring *Board* consideration of the employers' contention. If, on the other hand, the union does not file a charge upon the demand to leave, or if the charge is resolved by a General Counsel dismissal which is "illuminated by [an] explanation that * * * squarely defines" the picketing as unprotected (*Hanna Mining*, 382 U.S., at 192), or by a final decision on the merits to that effect, the employer would be free to invoke the state trespass law.

This suggestion, we submit, goes to the very outer limits of deference to the employer interest in a hearing on his trespass claim. For, it would be an intolerable interference with the federal scheme to permit in cases such as this the various states in the first instance to work out as they see fit the "accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other'" called for in *Hudgens* v.

NLRB, 424 U.S., at 522. There is a strong probability that the picketing is protected and that the employers' claim of an illegal trespass is therefore without merit. (See pp. 23-31, *supra*, discussing the *Scott Hudgens* case.) And, as we have stressed, "the greatest threat against which the *Garmon* doctrine guards [is] a state's prohibition of activity that the Act indicates must remain unhampered," (*Hanna Mining*, 382 U.S. at 193). Moreover, since the "locus of the [required] accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context" (*Hudgens*, 424 U.S. at 522), this is assuredly the paradigm case for application of the lesson of *Lockridge*:

"The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. The principle of pre-emption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme." (403 U.S., at 286; footnote omitted.)

To be sure, in order to initiate the Board proceeding envisioned here, the employer must take an action (demanding that the pickets leave) that may constitute a § 8(a)(1) violation. (See *Scott Hudgens*, 95 LRRM at 1355.) But as the Court said in *Garment Workers v. Labor Board*, 366 U.S. 731, 739-740, "this places no particular hardship on the employer * * *. [N]o penalty is attached to the violation * * *. If he is found to have erred * * * he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act * * *."

It is also true that the burden of the delay inevitable when a dispute is resolved through an administrative or judicial proceeding will, under our suggestion, rest on the employer. Balancing the respective interests that is where the burden should rest. The federal interest served by requiring prior resort to the Board is assuring the "freedom of labor to use the weapon of picketing" so long as that picketing has not been "ascertained by [the Act's] prescribed processes to fall within its prohibitions." (*Garner*, 346 U.S. 499-500.) And, there is a strong probability that in the situation presented here a state court injunction prior to a Board determination would improperly interfere with picketing the Act's prescribed process would declare to be outside those prohibitions and within that freedom. The interest on the other side is the employer's property interest. The California Supreme Court did not denigrate that interest but rather accurately described the realities when it stated that the employer's "property right" is one "worn thin by the public usage." (*Schwartz-Torrance*, 61 Cal. 2d, at 835, 40 Cal. Rptr., at 236.) "[U]nlike a situation involving a person's home no meaningful claim to protect the right of privacy can be advanced by [the em-

ployer]. Nor * * * can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (*Food Employees v. Logan Plaza*, 391 U.S. 308, 324.)[15] The Act, as this Court early recognized, contemplates the "[i]nconvenience, or even some dislocation of property rights" (*Republic Aviation Corp. v. Board*, 324 U.S. 793, 802, n.8.) It is difficult to conceive of a more marginal or, as we have shown, a more necessary, inconvenience than that suggested here.

[15] While *Hudgens* overruled the constitutional doctrine stated in *Logan Valley*, it did so on the ground that the private title was sufficient to make controlling the "commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government" (424 U.S. at 513), and not on the ground that *Logan Valley* had mischaracterized the weight to be given the property right in a statutory balancing test such as that called for by the NLRA.

CONCLUSION

For the above-stated reasons the instant case should either be remanded to the Supreme Court of California for a determination as to whether the injunction issued here is proper under state law or the decision of the California Supreme Court should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF FOR SEARS, ROEBUCK AND CO.

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REPLY BRIEF FOR SEARS, ROEBUCK AND CO.

I. INTRODUCTORY STATEMENT

In its principal brief ("Pet. Br."), Sears argued that state courts are not preempted by the National Labor Relations Act ("NLRA" or "the Act") from framing and enforcing an injunction aimed narrowly at trespassory union activity on private property. Regulation of such conduct, it was submitted, touches interests that are "deeply rooted in local feeling and responsibility." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959). Absent such regulation there would be a legal vacuum and the risk of undesirable physical confrontations.

Respondent Union and *amicus curiae*, the National Labor Relations Board, have now responded with several arguments,

many merging the jurisdictional issue before this Court with the underlying merits of the case. The Union asserts that because its activity in this case was "arguably" protected by the Act, the courts below were thereby automatically preempted from asserting jurisdiction. The Board urges a similar result alleging that, as the Union's conduct was "arguably" prohibited by the Act, there was an alternative forum in which to litigate the legality of such conduct. Both the Union and the Board also contend that while admittedly "there is a substantial state interest in prohibiting [the Union's] picketing because it occurred on private property, the potential for interference with the federal regulatory scheme is too great to warrant an exception to *Garmon* permitting such regulation. . . ." Bd. Br., p. 7; Union Br., pp. 6-7. Finally, the Union now contends, for the first time, that resolution of the preemption issue "in the present context would be premature" since it is not clear whether, "if the California courts had asserted jurisdiction, an injunction would have issued." Union Br., p. 5.

In reply, Sears will demonstrate four basic points:

1. Notwithstanding whether the Union's conduct was either "arguably" protected or "arguably" prohibited, the risk of conflict between state and federal regulation in trespass cases is minimal in view of the adequate safeguards that presently exist. Accordingly, the risk of any conflict is outweighed by the deeply-rooted state interest in protecting private property and preventing violence and disregard for the law.

2. Wholly apart from these historic factors, which have provided the predicate for state court jurisdiction in the past, the appropriate test in the circumstances of the instant case, *i.e.*, cases involving the application of state trespass statutes to union activity, is whether the conduct is "actually" protected. *International Longshoremen's Association* v. *Adriadne Shipping Co.*, 397 U. S. 195, 202 (1970) (White, J., concurring). That test has not been met in this case.

3. Similarly, the "arguably" prohibited test is inapplicable to disputes involving, as here, the lawfulness of the location of union activity on private property rather than its purpose—the *location* of union activity will never give rise to a violation of Section 8(b) of the Act.

4. The Union's assertion that a determination as to the propriety of an injunction under California state law should be a prerequisite to this action is without merit for three independent reasons: (i) the merits of the issue cannot be addressed until the instant jurisdictional issue is resolved; (ii) the state law argument has not been raised in timely fashion; and (iii) in any event, the Union's construction of state law is incorrect.

II. ARGUMENT

1. As discussed at length in Pet. Br., pp. 7-14, and now conceded by the Board, "there is a substantial state interest in prohibiting [union] picketing because it occurred on private property[.]" Br. Br., p. 7.[1] See *Taggart* v. *Weinacker's*, 397 U. S. 223, 227-229 (1970) (Burger, C.J., concurring). It is immaterial, therefore, as to whether the conduct here at issue is either "arguably" protected or prohibited by the Act; it may nevertheless be regulated by the states as an exception in the *Garmon* doctrine unless other countervailing factors are present. The Union and the Board attempt to establish such countervailing interests in this case by conjuring up the specter of a potential conflict between state and federal regulation of the conduct here at issue. There is no merit to this contention.

First, as demonstrated at Pet. Br., pp. 12-18, there is no reason "to assume . . . that a state will so construe its [trespass] law . . ." as to conflict with a union's rights under the NLRA. *Allen-Bradley Co.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 746 (1941). The Board even has recourse under *N. L. R. B.* v. *Nash-Finch*, 404 U. S. 138 (1971), to a federal district court injunction against both an employer and the state court in the "rare cases" (Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 Harv. L. Rev. 552, 553 (1970)) where its views conflict with those of the state court, and the state court "refuse[s] to vacate the injunction

1. The Union's contention that California does not possess a "deeply rooted" interest in regulating union picketing or private property because California law does not prohibit such conduct is refuted by the contrary findings of the California Court of Appeal in its two decisions in this case. See Pet. App., pp. A13, A30. The California Supreme Court did not question this aspect of the lower court's holding, although it was free to do so. Indeed, if the California Supreme Court had disagreed with the lower court on this point, presumably it would have so stated since it could thereby have avoided the preemption question, as now urged by the Union. See Union Br., pp. 8-9.

in these circumstances[.]" *May Department Store Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 164, 355 N. E. 2d 7, 12 (1976). The Board may also immediately seek injunctive relief, upon the filing of an unfair labor practice charge, under Section 10(j) of the Act, 29 U. S. C. § 160(j). Pet. Br., pp. 16-17; NLRB's General Counsel's Report on Case Handling Developments at NLRB, 96 Labor Relations Reporter 171, 175 (Bureau of National Affairs, October 31, 1977).

Second, the Board and the Union apparently believe that *Farmer* v. *United Brotherhood of Carpenters, and Joiners of America, Local 25*, ... U. S. ....., 97 S. Ct. 1056 (1977), requires a finding of preemption whenever a substantial risk of conflict between state and federal regulation exists, even where the state's interest in regulating the conduct in question is, in fact, "deeply rooted". *Farmer* does not, however, require such a result; it calls instead for a *"balanced inquiry* into [these] factors. . . ." 97 S. Ct. at 1064 (emphasis added). The balance in trespass cases tips in favor of concurrent jurisdiction. Initially, the "deeply rooted" state interest involves more than the preservation of property rights; the desire to prevent physical confrontation and violence is also at the crux of the state interest. See Pet. Br., pp. 8-14.[2] On the other hand, the risk of inconsistent judgments is neither great nor frequent in trespass cases, and when it occurs, as already noted, it is correctible. Moreover, if a state court's view as to the legality of the location of the union's trespass did conflict with that of the Board, the state injunction "merely ha[s] the effect of maintaining the

2. The preservation of property rights is not solely a state interest; it is also an important federal policy. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Scott Hudgens* v. *N. L. R. B.*, 424 U. S. 507 (1976). See also *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972). By the same token the prevention of violence has provided a basis for allowing concurrent jurisdiction in a libel context. *Linn* v. *Plant Guards, Local 114*, 383 U. S. 53, 64 n. 6 (1966). Trespass situations present an even more severe threat of physical confrontation, as well as the federal and state interest in preserving property rights.

status quo during the pendency of the NLRB proceedings." *May Department Stores*, 64 Ill. 2d at 164; 355 N. E. 2d at 12. A finding of preemption, however, would cause the employer to "suffer serious harm" to its property rights "while the NLRB was considering whether an unfair labor practice should issue." *Ibid.* The threat of a state court proceeding would even accelerate the Board's processes by motivating a union to file an unfair labor practice charge when asked to remove its activity to a public situs. Absent a threat of a state court action, a union engaged in only "arguably" lawful, and hence possibly unlawful conduct, will not file a charge, as occurred in the instant case. A simple request to leave private property would not motivate a union to risk an adverse Board decision with regard to such "arguable" conduct. Accordingly, an employer, in the absence of state court jurisdiction, would have to resort to physical self-help to obtain a hearing, and risk the physical confrontations that ordinary recourse to the courts could obviate.[3]

Third, the Union seeks to avoid the basic jurisdictional question, whether state courts can ever act in alleged trespass situations, by focusing instead on the merits of this case. For example, its assertion that conflict is likely in trespass situations is based almost entirely upon a comparison between the narrow factual

3. Such circumstances, by which an employer must commit an unfair labor practice in order to obtain a forum for a civil wrong, constitutes the "absence of a *meaningful opportunity* for hearing [and] violates the most fundamental requirements of the Due Process Clause." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 972 (W. D. Mich. 1974) (citation omitted, emphasis added). See Pet. Br., pp. 16-18 and nn. 9 and 10; and *Motorcoach Employees* v. *Lockridge*, 403 U. S. 274, 326 (1971) (White, J., dissenting). Indeed, as even the Board has admitted, it is a "right of all persons to resort to the civil courts to obtain an adjudication of the claims". *Clyde Taylor Co.*, 127 NLRB 103, 108 (1960); and see also the NLRB General Counsel's Report on Case Handling Developments at NLRB, reprinted in 96 Labor Relations Reporter 141 (Bureau of National Affairs, October 24, 1977), noting that a Board Administrative Law Judge sustained an employer's right to resort to the state courts in response to trespassory conduct by union pickets.

issue of the instant controversy, *i.e.*, non-employee picketing on private property containing a single retail business establishment, and the facts of *Scott Hudgens*, 230 NLRB No. 73. These situations, however, are not typical. As this Court recognized in *Hudgens* (424 U. S. at 521), there is a wide spectrum of factors involved and, in most instances, there will ordinarily be alternative means of communication available to a union which will eliminate the risk of conflict. See Pet. Br., pp. 12-13. In these instances, the union would have no right to compel a "yielding" of employer property rights and the assertion of state jurisdiction would raise no conflict.

2. State courts should not be preempted from regulating trespassory union picketing which is, as here, "arguably" protected by the NLRA, unless it is first determined by the state court to be "actually" protected. See *Adriadne*, 397 U. S. at 202 (1970) (White, J., concurring); *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325-327 (1971) (White, J., and Burger, C. J., dissenting). Every instance of a union trespass on private property, regardless of its form or object, is "arguably" protected by Section 7 of the NLRA. Nevertheless, as both the Union and Board concede, there are "clear" cases in which the state courts are entitled to concurrently regulate such conduct. See Union Br., pp. 29-31, n. 14; Bd. Br., p. 15, n. 9. *Ab initio*, however, even in these "clear" instances, the state courts must determine whether "actual", rather than "arguable", violence has occurred. They must decide whether, in

4. For example, it is acknowledged that a sit-in at a plant is not protected by the Act and is subject to state regulation. *N. L. R. B.* v. *Fansteel Metallurgical Co.*, 306 U. S. 240 (1939); Union Br., pp. 29-31, n. 14. Similar conduct, however, in slightly different circumstances, may be protected. See, e.g., *United Merchant's Mfg., Inc.* v. *N. L. R. B.*, 554 F. 2d 1275 (4th Cir. 1977) (affirming a Board order in which, *inter alia*, a 25 minute work stoppage, in plant, was held to be protected activity). It is likewise not uncommon for the Board and the courts of appeals to disagree as to the protected status of certain conduct. See, e.g., *Associated Grocers of New England, Inc.* v. *N. L. R. B.*, ... F. 2d ...., 96 LRRM 2630 (1st Cir. September 16, 1977) (rejecting a Board rule that a strikers' threat unaccompanied by an overt physical threat is protected activity).

fact, there has been impermissable conduct "within the store" or other unprotected trespasses. Of course, the determination as to whether the requisite misconduct occurred may be complex and difficult.[4] The state courts must, nevertheless, make such a decision and, notwithstanding that such conduct may ultimately be deemed activity that falls within the ambit of Section 7 of the Act, initially review such activities in order to decide whether state jurisdiction should be invoked and, if so, the scope and nature of a restraining order. Contrary to the Union's position (Union Br., p. 6), therefore, this Court has repeatedly recognized exceptions to *Garmon* where the activity involved is "arguably" subject to the protection of the Act. It is only where the activity is actually protected that *Garmon* has interposed an insurmountable barrier to state court action.

In the present case, although the Union's picketing is "arguably" protected by the Act under the Board's *Hudgens* rule (see Union Br., pp. 24-27; Bd. Br., pp. 10-12), the conduct may also not be protected by the Act and subject to state regulation.[5] To repeat, however, this issue does not essentially differ from other choices already confronting state courts—whether,

5. This determination will, of course, depend on whether *Hudgens* correctly established "the locus of . . . the accommodation", and, if so, whether such a "generic situation" can be equated to that involved in the instant case. *Hudgens* v. *N. L. R. B.*, 424 U. S. at 521-3. *Hudgens*, as the Union observes (Br., p. 26), has not been subject to appellate court review, and is also sharply at odds, in many respects, with prior Board and court decisions. See, e.g., *S. E. Nichols of Ohio*, 200 NLRB 1130 (1972); *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539 (1972).

There are also acknowledged differences between *Hudgens* and the instant case. See Union Br., p. 27. *Hudgens* involved a shopping center, the instant case does not (cf. *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539); the desired location of the picketing in *Hudgens* was inside the center which was not the case here; and in this case the Union had another, effective alternative location at which to picket. Pet. Br., p. 13, n. 8. Furthermore, the Board's reliance in *Hudgens* on the fact that the center is "open to the public" echoes the constitutional standards of *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308 (1968), rejected by this Court in its *Hudgens* decision.

for instance, mass picketing sufficiently obstructs traffic so as to be subject to state regulation under *Allen-Bradley*. See also Pet. Br., pp. 11-12. The instant case, as a result, does not present a situation which is either novel or uncommon. This Court has consistently recognized, in effect, that, even though conduct is "arguably" protected, it may nevertheless not be preempted absent a determination that it is actually protected.

3. The Board also contends (Bd. Br., pp. 7-9) that the Union's conduct in this case is "arguably" prohibited, as well as "arguably" protected, by the Act, a contention not presented by the Union. The Union's picketing in this case, the Board submits, is "arguably" prohibited by both Section 8(b)(7)(C) (prohibiting picketing with a recognitional objective beyond 30 days without filing a petition for election with the Board) and Section 8(b)(4)(D) (prohibiting picketing that has as an object to force reassignment of work) of the Act. The Board overlooks, however, the critical distinction between the location and the purpose or objective of picketing. Section 8(b)(4)(D) and 8(b)(7)(C) govern only the object of union picketing, not its location. The situs of picketing, like any other union conduct on private property, is, as this Court made clear in *Hudgens*, controlled only by the accommodation doctrine of *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).[6] Thus, even if the Board were to find, pursuant to a § 8(b) charge filed by Sears, that the object of the Union's picketing was unlawful, the resulting cease and desist order would only ban the Union from picketing for a jurisdictional or recognitional objective; it would not terminate picketing on Sears' property. If the Union then desired to remain on Sears' property, it could simply change the object of its picketing to a legitimate one. Indeed, if the Board's "arguably" prohibited analysis was correct, a union, as an

6. The only way that this issue of location can be resolved by the Board is in the context of an unfair labor practice proceeding against an employer who is seeking to remove such union activity from its private property. At that point, the question of whether the location is *protected* can be brought before the Board. See Pet. Br., pp. 14-18.

NLRA law-breaker asserting the doctrine of preemption, would be in a position superior to the situation in which it would be if it had obeyed the Act.

4. The Union's assertion (Union Br., pp. 7-18) that resolution of the preemption issue "in the present context would be premature" is incorrect. Initially, the California court correctly addressed the basic jurisdictional issue before evaluating the state law issues. The Union would have the state courts evaluate the merits of a case before determining whether its jurisdiction permits it to conduct such an evaluation. Moreover, the failure of the Union to raise in timely fashion the "undiscovered" California statute (Cal. Code Civ. Procedure, § 527.3), upon which it relies, renders it inappropriate to now present these issues to this Court. *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308, 337 (Harlan, J., dissenting).

In any event, the Union is incorrect in asserting that no action lies under California law to preclude the instant trespass. The two California courts below that addressed the issue reached the opposite result and nowhere does the decision of the California Supreme Court suggest that this view is incorrect. Nor does the "undiscovered" section 527.3 of the California Code of Civil Procedure, relied on by the Union, affect that conclusion. This section does not alter the substantive law of criminal trespass, expressly disclaiming any such intention:

> "(e) It is not the intent of this section to permit conduct that is unlawful including breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity."

Subsection (b)(1), the provision relied on by the Union,[7] only protects picketing in situations where the pickets, unlike this case, may "lawfully be" situated. In short, this provision does not define the lawful location at which picketing may occur but only, as the California courts have stated in an analogous context, *"preserve[s] the existing law"* as to its situs. *City and*

County of San Francisco v. *Evankovich*, 137 Cal. Rpts. 883, 890 (Ct. of App. 1977) (emphasis added). Hence, the determination of the lower California courts that the pickets were, in fact, not where they "may lawfully be" remains undisturbed by the "undiscovered" statute. Pet. App. D., pp. 15-30; accord: *International Molders and Allied Workers Union, Local 164, AFL-CIO* v. *Superior Court*, 138 Cal. Rptr. 794 at 797-798 (Ct. of App. 1977), pet. for hearing den, Cal. S. Ct., 1977.

III. CONCLUSION

For the reasons stated in its principal brief and in this brief, Sears, Roebuck and Co. respectfully prays that judgment of the Supreme Court of California be reversed and that this case be remanded to that Court with instructions to assert jurisdiction.

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7. "(b) The acts enumerated in this subdivision, whether performed singly or in concert, shall be legal, and no court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from doing any of the following:

(1) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or *any place where any person or persons may lawfully be*, or by any other method not involving fraud, violence or breach of the peace" (emphasis added).

No. 76-750

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO., PETITIONER

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether the National Labor Relations Act (NLRA) preempts a state court trespass action to enjoin peaceful picketing, conducted on the privately owned sidewalks and parking lot adjacent to a retail store, which is arguably either prohibited by Section 8 or protected by Section 7 of the NLRA. Similar questions were pre-

sented, but not reached by the Court, in *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308; and *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223. The Board filed briefs *amicus curiae* in each of these cases.

The National Labor Relations Board (the Board) is responsible for administering the NLRA and implementing the national labor policy adopted by Congress therein. The NLRA protects the right to picket in connection with a labor dispute, but also proscribes or limits such picketing in certain circumstances. The Board therefore has an important interest in the proper application of preemption principles to state regulation of picketing in order to preclude interference with the uniform administration of federal law through the use of conflicting state rules and remedies.

STATEMENT

Sears, Roebuck and Co. (Sears) operates a retail department store in Chula Vista, California. The store building is centered on a large, rectangular-shaped piece of land. Walkways abut the building on all four sides; they in turn are surrounded by a large parking area. The land on which the store, the walkways, and the parking area are located is owned by Sears. The external limits of the Sears property are bounded on three sides by public sidewalks and streets,[1] and on the fourth by private residences sep-

[1] The building is located 220 feet from 5th Avenue, 228 feet from H Street, and 490 feet from I Street (Pet. App. A5).

arated from the property by a concrete wall. Sears' store is the only building on the property. (Pet. App. A31.)

On October 24, 1973, Business Representatives Floyd Cain and Dallas Roose of San Diego District Council of Carpenters (the Union) went to the Sears store to verify information conveyed by a Union member that certain carpentry work was being performed there (App. 17-18). The business agents were informed by the store security manager that the work—remodeling the women's fashions department—was being done by Sears' employees (App. 12). Later that day, Cain and Roose met with store manager Joe Ochoa. Cain "explained to him that the work being performed was carpenter work and that the particular carpenter at the job had not been dispatched by our hiring halls and that other workers performing other work at their store were clerical workers in the store by their own admission" (App. 18). Roose and Cain asked Ochoa "either to contract the work through a bona fide building trades contractor who would in turn utilize qualified and dispatched carpenters to perform the carpenter work in question; or in the alternative to sign a short form agreement which would require Sears to abide by the terms of the master contract agreement with regard to the dispatch and use of carpenters in completing the construction on that job" (*ibid.*). Ochoa promised to look into the matter and give the business agent an answer the next day, but he failed to do so (*ibid.*).

On the morning of October 26, the Union began to picket on Sears' property. Five pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the "Carpenters' Trade Union." The store security manager told the pickets that they were on Sears' private property and requested that they leave and picket on the public sidewalks. The pickets initially complied with the request and removed their picketing to the public sidewalks abutting the Sears property. However, about an hour later, on Business Representative Roose's instruction, they returned to the parking lot and resumed picketing there (App. 13). Roose told the security manager that "the parking area * * * was a public thoroughfare and his pickets did not have to leave"; they would not leave unless compelled to do so by "legal action" (App. 14). The pickets conducted themselves in a peaceful and orderly fashion, and there was no obstruction of traffic (Pet. App. A32).

On October 29, Sears filed suit in a state court for injunctive relief on the theory that the picketing constituted a continuing trespass on its property (App. 1-6). The same day the court issued an *ex parte* temporary restraining order, enjoining the Union from picketing on Sears' property (App. 10-11).[2] On November 21, the court, after hearing, issued a preliminary injunction to the same effect; the injunction expressly excepted the public sidewalks adjacent to Sears' property (App. 34-35). The California Court of Appeal, Fourth Appellate District, sustained the injunction (Pet. App. A4-A13, A14-A30).

[2] After issuance of the restraining order, the Union moved its pickets to the public sidewalks. But two weeks later it stopped the picketing, allegedly because of its ineffectiveness (App. 19, 28; Pet. App. A5, A33).

The Supreme Court of California reversed (Pet. App. A31-A46). The court pointed out that *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, " 'established the general principle that the [Act] pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act' " (Pet. App. A35). It found that the Union's picketing here was arguably either "area standards" picketing protected by Section 7 of the NLRA, 29 U.S.C. 157 (Pet. App. A36), or recognitional picketing regulated by Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C) (Pet. App. A37-A39).

The court held that the conclusion of preemption that follows from these findings is not affected by the fact that the picketing was conducted on private property. It pointed out that union activity does not fall outside the protection of Section 7 merely because it occurs on private property; it is the task of the Board to make an " '[a]ccommodation between [section 7 rights and private property rights] with as little destruction of one as is consistent with the maintenance of the other' " (Pet. App. A36, quoting from *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112). Accordingly, to leave the State free to regulate under its trespass law the type

of picketing involved here would present a real danger of subverting the uniformity Congress envisioned for the federal regulatory program. The court therefore held the *Garmon* rationale for finding federal preemption to be equally valid here. (Pet. App. A44-A45.)

ARGUMENT

INTRODUCTION AND SUMMARY

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, this Court enunciated the principle that:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes. [Footnote omitted.]

But, as the Court recently noted in *Farmer* v. *United Brotherhood of Carpenters*, No. 75-804, decided March 7, 1977, slip op. 5-6, "the same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases" (footnote omitted). These exceptions " 'in no way undermine the vitality of the preemption rule' * * *. To the contrary, they highlight [the Court's] responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme" (*id.* at 7).

We submit that the picketing here was arguably either restricted by Section 8 or protected by Section 7 of the NLRA, and that, although there is a substantial state interest in prohibiting such picketing because it occurred on private property, the potential for interference with the federal regulatory scheme is too great to warrant an exception to *Garmon* permitting such state regulation where, as here, that property is open to the public. This is not a case in which the parties had no available means of obtaining a Board determination of the legality of the picketing; accordingly, the preemption of state regulation will not leave the employer without a remedy.

THE NLRA PREEMPTS A STATE COURT TRESPASS ACTION BROUGHT TO ENJOIN PEACEFUL PICKETING WHICH IS ARGUABLY EITHER PROHIBITED BY SECTION 8 OR PROTECTED BY SECTION 7 OF THE NLRA

A. The picketing here was arguably either restricted by Section 8 or protected by Section 7 of the NLRA

1. As the court below found, "the Union, prior to instituting picketing, requested that Sears contract

its work through a building trades contractor who would employ carpenters dispatched from [the] Union's hiring hall or, in the alternative, sign an agreement with the Union by which Sears would be bound to hire through the Union's hiring hall at prevailing wage scales" (Pet. App. A35). On these facts, the Board could have found that the Union's object in picketing Sears was to compel it to reassign the carpentry work, which it had given to its own employees (*supra*, p. 3), to members of the Union. Had the Board so found, the Union's picketing would have violated Section 8(b)(4)(D) of the NLRA, 29 U.S.C. 158(b)(4)(D),[3] which prohibits a union from seeking to force a reassignment of work, not only where the work is being performed by another union, but also where it is currently being performed by the employer's own unrepresented employees. *International Brotherhood of Electrical Workers, Local 24 (General Electric)*, 207 NLRB 337, 338-339.

Alternatively, as the court below noted (Pet. App. A37), the Board could have found that the Union was picketing for a recognitional object, and that continued picketing would be subject to the restrictions of Section 8(b)(7)(C) of the NLRA, 29 U.S.C. 158(b)(7)(C). That Section makes it an unfair

[3] That Section prohibits a union from exerting economic pressure with an object of "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *."

labor practice for a union to picket for a recognitional object for more than 30 days without filing with the Board a petition for a representation election. *Carpenters Local 1260 (Selzer Construction Co.)*, 210 NLRB 628, 630-631, enforced, 90 LRRM 2891 (C.A. 8).

2. On the other hand, the Board could have found that the Union's object was solely to compel compliance with area standards, and that such picketing is protected by Section 7 of the NLRA. *United Brotherhood of Carpenters, Local 480 (National Mill Designs, Inc.)*, 209 NLRB 921. As the court below correctly pointed out (Pet. App. A36), that protection would not be lost merely because the picketing was "engaged in upon Sears' private property and, being without Sears' permission or approval, [was] consequently of a trespassory nature." In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, and *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, this Court recognized that, in certain circumstances, employees and their union representatives would have a Section 7 right to carry

[4] If the Board found that the Union's object was to compel Sears to sign a contract containing a union security clause, the Union's picketing for such a contract might also violate Section 8(b)(2) of the Act, 29 U.S.C. 158(b)(2). That Section prohibits a union from causing or attempting "to cause an employer to discriminate against an employee in violation of" Section 8(a)(3), 29 U.S.C. 158(a)(3). See *San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 237-238; *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 192 F.2d 577 (C.A. 10).

on organizational and other concerted activity on private property. Defining the scope of the right requires an "[a]ccommodation between [Section 7 rights and property rights] with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox Co., supra*, 351 U.S. at 112. As the Court added in *Hudgens, supra*, 424 U.S. at 522: "The locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance."

The Board's supplemental decision in *Hudgens*, 239 NLRB No. 73, issued June 23, 1977 (App., *infra*) indicates the considerations that are relevant to this accommodation. There the Board held that Section 7 of the NLRA gave Butler's warehouse employees, who were engaged in an economic strike, the right to picket Butler's retail store in a shopping center owned by Hudgens, for the purpose of appealing to Butler's customers not to patronize the store. Rejecting Hudgens' contention that, "if television, radio, and newspaper advertising is available, the picketers' Section 7 rights must yield to property rights," the Board found that such mass media "are not 'reasonable' means of communication for employee pickets seeking to publicize their labor dispute with a single store in the Mall" (App., *infra*, pp. 11a-12a). Furthermore, to confine the strikers to these alternatives "would under-

cut Board and Court precedent recognizing and protecting * * * picketing [at the situs of the dispute] as the most effective way of reaching those who would enter a struck employer's business, including situations in which the entrance to the employer's property is on land owned by another," citing *United Steelworkers of America* v. *National Labor Relations Board (Carrier Corporation)*, 376 U.S. 492, 499 (App., *infra*, p. 12a). The Board also rejected "Hudgens' suggestion that the pickets could have used public streets and sidewalks," in view of the facts, *inter alia*, "that the closest public area * * * is 500 feet away from the store, and that a message announced orally or by picket sign at such a distance from the focal point would be too greatly diluted to be meaningful" and, in the circumstances of the case, would present a safety hazard (App., *infra*, p. 13a).

Under the reasoning of this decision, it is at least arguable that, if the object of the Union picketing here were to appeal to consumers not to patronize Sears because it was using substandard carpenter labor, the Board would find that Section 7 of the NLRA afforded the Union the right to conduct that picketing on Sears' parking lot and walkways. The picketing, though engaged in by nonemployees who were protesting substandard conditions rather than employees who were furthering an economic strike, nonetheless would be for an object protected by Section 7. The fact that Sears' store was the only store on the property would make it easier than it would be in the multi-store shopping center involved in *Hudgens* to identify Sears'

customers. Nevertheless, if the pickets were relegated to the public sidewalks surrounding Sears' parking lot, they would be at least 200 feet from the store (note 1, *supra*). Accordingly, as in *Hudgens*, their message would have had to "be read by those to whom [it was] directed either at a distance so great as to render [it] indecipherable" (*Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 322), or while their attention was focused on driving onto the property and finding a parking space.[5]

B. The State's interest in applying its trespass laws does not justify an exception to the *Garmon* rule in the situation here

In *Farmer* v. *United Brotherhood of Carpenters*, *supra*, the Court set out the areas in which exceptions to *Garmon* have been recognized (slip op. 6):

> We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the Labor Management Relations Act * * * [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S., at 243-244. See, e.g., *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel); *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees* v. *Lockridge*, 403 U.S., at 297-298. See *Vaca* v. *Sipes*, 386 U.S. 171 (1976) (duty of fair representation cases). [Footnotes omitted.]

[5] Moreover, in contrast to *Hudgens*, where the picketing impinged on the interests of the shopping center owner with whom the union had no direct dispute, the picketing here affected only Sears, with whom the Union has its labor dispute.

In *Farmer*, the Court added another exception—the intentional infliction of emotional distress by outrageous conduct.

Contrary to petitioner's contention (Br. 11-14), the reasons for these exceptions do not exist here.[6] The activity here—peaceful picketing—clearly is not "a merely peripheral concern" of the NLRA. It is a subject that Congress, in the NLRA, regulated in a comprehensive manner.[7] And where, as here, such picketing occurs on private property that is open to the

[6] Although various factors negating federal preemption have been separately identified, this Court's holdings that state courts retain the power to regulate certain labor-related conduct have turned on analysis of the entire situation. It is thus doubtful that any single factor would be sufficient by itself to negate federal preemption (cf. *Farmer*, *supra*, slip op. 11). In any event, none of these factors is present here.

[7] See *Garner* v. *Teamsters Union*, 346 U.S. 485, 487-489, 499-500; *San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 237-238, 245.

public, state regulation of peaceful picketing would not be justified on the ground that protection of private property from trespass is an interest "deeply rooted in local feeling and responsibility." The protection of an owner's right to prevent trespasses is obviously a matter of substantial local concern.[8] But that right is not absolute; and, indeed, the NLRA is in significant part designed precisely to limit that right (at least where, as here, no significant interference with privacy interests is involved). See, *e.g.*, *National Labor Relations Board* v. *Babcock & Wilcox Co.*, *supra*, 351 U.S. at 112.

Finally, this is not a situation in which federal preemption need not be invoked because there is "no risk that permitting the state cause of action to proceed would result in state regulation of conduct that

[8] In determining whether the state interest is so substantial that Congress should be presumed to have left the matter to the States, the conclusions of the state courts that have considered this matter are particularly relevant. They are not in accord (see cases cited at Pet. 6-8, nn. 2, 3 and see *Shirley* v. *Retail Store Employees Union*, 565 P.2d 585 (Kan. Sup. Ct.); *Commonwealth* v. *Noffke*, Mass. App. Ct., decided July 8, 1977, 46 U.S.L.W. 2024). But since the state courts can be expected to be especially sensitive to the need to protect state interests, the fact that several state courts, like the court below (Pet. App. A39-A44), have concluded that no interests "deeply rooted in local feeling or responsibility" are threatened by federal preemption of the regulation of peaceful picketing on private property strongly suggests that there is no generally recognized deeply rooted state interest in this area. Moreover, the lack of state court concensus on this matter similarly suggests that it would be inappropriate to infer that this is one of those fundamental state interests that Congress must have intended to leave the States free to protect when it enacted the NLRA.

Congress intended to protect." *Farmer* v. *United Brotherhood of Carpenters*, *supra*, slip op. 7. Here, that risk is substantial in view of the delicate accommodation between employee rights and property rights required of the Board in determining whether Section 7 of the NLRA would entitle the employees or their union representative to picket peacefully on private property.[9] And the risk is enhanced by the fact that state trespass laws are not "so structured and administered that * * * it is safe to presume that [their application] will not disserve the interests promoted by the [NLRA]." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 297-298.[10]

[9] The State would, under its police powers, have power to regulate picketing occurring on private property or elsewhere, insofar as it resulted in violence or obstructed traffic. See *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740.

Moreover, since picketing within the store is clearly not protected by Section 7 of the NLRA (see *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C.A. 7)), the State would be free to enjoin such picketing, contrary to petitioner's suggestion (Br. 15-16).

[10] State trespass laws seek to vindicate a property owner's right to use his property as he sees fit and open it only to those he chooses to invite. Because they are not designed to accommodate other competing interests, those laws may frequently conflict with rights protected by the NLRA (see *supra*, pp. 9-12).

The fact that state trespass laws have general applicability and are not specifically directed toward the regulation of labor relations is not a sufficient reason to exempt their application to labor disputes from the *Garmon* preemption principle. See *Farmer*, *supra*, slip op. 9; *Garmon*, *supra*, 359 U.S. at 244.

Nor is it an acceptable alternative (see Pet. Br. 16-17) to permit the state court to enjoin the picketing on trespass grounds pending a Board determination of whether the picketing is protected by Section 7, and then vacate the state court injunction should the Board find the picketing protected. Experience with the use of injunctions in labor disputes teaches that such a temporary restraint would tend so to weaken the position of the union and its supporters that, by the time it were lifted, their Section 7 right to picket on the property would have little vitality. See Frankfurter and Greene, *The Labor Injunction* 200-201 (1930).

C. An exception to the *Garmon* rule is not warranted because of any inadequacy of Board processes to resolve the respective rights of the pickets and the property owner

In his concurring opinion in *International Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 201-202, Mr. Justice White indicated that, where picketing clearly was not proscribed by Section 8, he would be willing to find that it was immune from state control only if the activity was "actually, rather than arguably, protected under federal law." For, "an employer faced with 'arguably protected' picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB. The employer may not himself seek a determination from the Board and is left with the unsatisfactory remedy of using 'self-help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice."

And see *Motor Coach Employees* v. *Lockridge*, *supra*, 403 U.S. at 325-331 (White, J., dissenting). Cf. *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 227 (Burger, C.J., concurring). We submit that these considerations do not warrant an exception to the *Garmon* rule here.

First, since the union's activity here was arguably prohibited by Section 8 of the NLRA (see *supra*, pp. 7-9), Sears could have filed a charge with the Board's General Counsel alleging that the picketing violated the Act. If the General Counsel found reasonable cause to believe that the charge had merit, he would have issued a complaint so that the matter could be adjudicated by the Board. Pending such Board determination, he would have had power, under Sections 10 (*l*) and 10(j) of the NLRA, 29 U.S.C. 160 (*l*) and 160(j), to petition an appropriate federal district court for a temporary injunction enjoining the picketing. If the Board sustained the complaint and the Union refused to comply with the Board's order, the Board could then apply to the appropriate court of appeals, under Section 10(e) of the Act, 29 U.S.C. 160(e), for enforcement of that order.

Second, if the General Counsel had refused to issue a complaint on a charge alleging that the picketing violated Section 8 of the NLRA, Sears would not have been required to resort to further self-help in order to furnish the Union with grounds for charging Sears with an unfair labor practice and thereby triggering a Board determination of whether the picketing was in fact protected by Section 7. Section 8(a)(1) of the

NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sears' act of informing the pickets that they were not permitted to picket on its property would constitute a sufficient interference with rights arguably protected by Section 7 to warrant the General Counsel, had a charge been filed by the Union, in issuing a Section 8(a)(1) complaint against Sears. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 795; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813-814 (C.A. 7) (employer violates Section 8(a)(1) by banning union solicitation by employees on company property during their nonworking time)."

On the facts of this case there were thus procedures available by which either party could have sought a Board determination of the legality of the picketing under the NLRA. Sears should not be heard to complain that the Union failed to utilize those procedures when it also failed to do so.

Moreover, even if a Board determination of the legality of the picketing could not readily be obtained, that would not warrant creating an exception to the

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" The protection of Section 7 is not limited to labor disputes involving employees of the particular employer against whom the picketing is directed. See Sections 2(3) and 2(9) of the NLRA, 29 U.S.C. 152(3) and 152(9). Thus, if the pickets here were protesting against substandard wages that threatened their own job interests, there clearly was a labor dispute within the meaning of the Act.

Garmon rule. As Mr. Justice Harlan stated in his separate opinion in *Taggart* v. *Weinacker's, Inc.*, *supra*, 397 U.S. at 230:

> While I recognize The Chief Justice's and Mr. Justice White's concern over the hiatus created when the Board does not or cannot assert its jurisdiction * * * that consideration is foreclosed, correctly in my view, by *Garmon*. Congress in the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an experienced agency. Where conduct is "arguably protected," diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to "arguably protected activities," until the Board has acted, even if wrongs may occasionally go partially or wholly unredressed.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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AUGUST 1977.

APPENDIX

FJPMW
D—2607
Decatur, Ga.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 10—CA—8823

SCOTT HUDGENS

and

LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; AFL-CIO

SECOND SUPPLEMENTAL DECISION AND ORDER

On August 16, 1971, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent (hereinafter also called Hudgens), had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening to cause the arrest of the Charging Party's pickets, employees of the Butler Shoe Company, while they were engaging in protected activity under Section 7 of the Act and ordering that Respondent cease and desist therefrom and take certain affirmative action. In concluding that Hudgens had

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[1] 192 NLRB 671.

violated Section 8(a)(1) of the Act, the Board relied primarily on the Supreme Court's *Logan Valley* decision.[2]

Thereafter, Respondent filed a petition for review and the Board filed a cross-petition for enforcement of its order with the United States Court of Appeals for the Fifth Circuit. While the case was before the court of appeals, the Supreme Court issued its decisions in *Central Hardware Co.* v. *N.L.R.B.*[3] and *Lloyd Corp., Ltd.* v. *Tanner*.[4] Thereafter, the Board moved the court of appeals to remand the case so that the Board might reconsider the merits of the question raised in light of those two decisions.

After the remand. the Board ordered a hearing and on April 9, 1973, Administrative Law Judge Thomas A. Ricci issued his Decision, concluding that Hudgens violated Section 8(a)(1) of the Act. In reaching this conclusion, the Administrative Law Judge found that under the balancing test enunciated by the Supreme Court in *N.L.R.B.* v. *The Babcock & Wilcox Company*,[5] the "Union had no other reasonable access to Butler's customers coming to the DeKalb shopping center." The Administrative Law Judge also, however, cited the *Logan Valley* description of

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[2] *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

[3] 407 U.S. 539 (1972).

[4] 407 U.S. 551 (1972).

[5] 351 U.S. 105 (1965).

shopping malls as "functional equivalents" of business districts as a "realistic view of the facts."

On August 21, 1973, the Board issued a Supplemental Decision and Order[6] adopting the Administrative Law Judge's conclusion that Hudgens violated Section 8(a)(1) of the Act, but stating that "[w]hile we agree with the Administrative Law Judge's recommendation that we reaffirm our earlier decision, we do so for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*."[7]

Hudgens again petitioned for review in the Court of Appeals for the Fifth Circuit, and on September 25, 1974, that court enforced the Board's Order.[8] However, rather than affirming the Board's reliance on *Peddie Buildings*, the court noted that in both *Babcock & Wilcox* and *Central Hardware*, the Supreme Court "limited its consideration to organizational cases," and suggested that "[a]lthough the consideration of alternatives required by *Babcock & Wilcox* is relevant to proper resolution of today's case, it is not the complete answer in consumer picket-

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[6] 205 NLRB 628 (1973).

[7] 203 NLRB 265 (1973), enforcement denied 498 F.2d 43 (C.A. 3, 1974). In *Peddie*, the Board affirmed an Administrative Law Judge's finding that the respondent had violated Sec. 8(a)(1) in circumstances similar to those here, but, in view of the Supreme Court's decision in *Central Hardware, supra*, which issued after the Administrative Law Judge's Decision, disavowed his reliance on *Logan Valley* and instead relied solely on *Babcock & Wilcox*.

[8] 501 F.2d 161.

ing cases."[9] Stating that the Supreme Court's rationale in *Lloyd Corporation* is "fully applicable here," the court held that:

> *Lloyd* burdens the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective.[10]

In affirming the Board's Supplemental Decision and Order, the court concluded that that burden had been met.

On March 3, 1976, the Supreme Court, holding that no first amendment issues were involved, reversed the court of appeals [11] and remanded the case to the court of appeals with directions to remand to the Board for consideration of the issues solely "under the statutory criteria of the National Labor Relations Act." [12] The court of appeals remanded the case to the Board on April 21, 1976.

On May 11, 1976, the Board invited the parties to file further statements of position. Subsequently, statements of position were filed by the General Counsel, by Respondent, and by the Charging Party, hereinafter called the Union.

Pursuant to the Court's remand, the Board has reconsidered its Supplemental Decision and Order, the

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[9] *Id.* at 166.

[10] *Id.* at 169.

[11] 424 U.S. 507.

[12] *Id.* at 523.

statements of position, and the entire record in this case, and hereby reaffirms, for the reasons set forth below, its conclusion that Respondent violated Section 8(a)(1) of the Act.

The Supreme Court majority in *Hudgens* held that persons entering a private shopping center do not have a first amendment right to engage in activity which would be accorded first amendment protection in public places. Therefore, if there is such a "right," it must have a source other than the Constitution. Accordingly, in remanding the case to the Board, the Court made it clear that any "rights and liabilities of the parties . . . are dependent exclusively upon the National Labor Relations Act." [13]

The facts in this case, essentially undisputed, were summarized by the Supreme Court as follows:

> The petitioner, Scott Hudgens, is the owner of the North DeKalb Shopping Center, located in suburban Atlanta, Ga. The center consists of a single large building with an enclosed mall. Surrounding the building is a parking area which can accommodate 2,640 automobiles. The shopping center houses 60 retail stores leased to various businesses. One of the lessees is the Butler Shoe Co. Most of the stores, including Butler's, can be entered only from the interior mall.
>
> In January 1971, warehouse employees of the Butler Shoe Co. went on strike to protest the company's failure to agree to demands made by their union in contract negotiations. The strikers

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[13] *Id.* at 521.

decided to picket not only Butler's warehouse but its nine retail stores in the Atlanta area as well, including the store in the North DeKalb Shopping Center. On January 22, 1971, four of the striking warehouse employees entered the center's enclosed mall carrying placards which read: "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." The general manager of the shopping center informed the employees that they could not picket within the mall or on the parking lot and threatened them with arrest if they did not leave. The employees departed but returned a short time later and began picketing in an area of the mall immediately adjacent to the entrances of the Butler store. After the picketing had continued for approximately 30 minutes, the shopping center manager again informed the pickets that if they did not leave they would be arrested for trespassing. The pickets departed. [Footnote omitted.][14]

The Court pointed out that the "basic objective under the Act," as stated in *Babcock & Wilcox*, is the "accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other' "[15] and that the "primary responsibility" for making that accommodation rests with the Board. As the Court observed, "[t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the

[14] *Id.* at 509.

[15] *Id.* at 522, quoting *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. at 112.

nature and strength of the respective § 7 rights and private property rights asserted in any given context." [16]

The Court noted three factors distinguishing the instant case from *Central Hardware* and *Babcock & Wilcox* that "may or may not be relevant" in striking the *Babcock & Wilcox* balance:

> First, [the instant case] involved lawful economic strike activity rather than organizational activity. . . . Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. . . . Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another. [Footnote omitted.][17]

In sum, the issue in this case is whether, without reference to first amendment considerations, the threat by Hudgens' agent in the circumstances here to cause the arrest of Butler's warehouse employees engaged in picketing Butler's retail outlet in Hudgen's shopping center, herein also called the Center or the Mall, violated Section 8(a)(1) of the Act.

As was noted by the Court, both *Babcock & Wilcox* and *Central Hardware* involved organizational activity carried on by nonemployees on the employer's property,[18] while the instant case involves lawful economic

[16] *Id.* at 522.

[17] *Id.* at 522.

[18] *Babcock & Wilcox* involved an employer's refusal to permit distribution of union literature by nonemployee union

picketing conducted by Butler's warehouse employees on property owned by Hudgens, the lessor of the property on which Butler's retail store is located. In this case, the Court's distinction between organizational and economic strike activity is to some degree intertwined with its employee-nonemployee distinction, in that in *Babcock & Wilcox* and *Central Hardware* the organizational activity in question was by nonemployee union organizers, whereas the economic picketing here was carried on by employees of the struck employer. We conclude that the three factual differences, i.e., the nature of the activity, the persons engaging therein, and the title to the property, do not

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organizers on company-owned parking lots. The Court there imposed no absolute requirement that the union have available no other means of communicating with the employees it desired to organize. Rather, the Court stated that, if the circumstances placed the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach its employees on its property, because the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. As noted, the Court emphasized that under such circumstances "the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112.

In *Central Hardware*, the company enforced its no-solicitation rule to prohibit nonemployee union organizers from soliciting employees in its parking lot. The Court held that the rationale of *Logan Valley, supra*, which rested on constitutional grounds, was inapplicable to a determination of whether Central had violated Sec. 8(a)(1) of the Act.

preclude our finding that Hudgens violated Section 8(a)(1).[19]

Concerning the first distinction noted by the Court, that the instant case involves economic strike activity rather than organizational activity, it is fully recognized by Board and Court precedent,[20] as well as by the parties to this proceeding, that both types of activity are protected by Section 7. Accordingly, economic activity deserves at least equal deference,[21] and the fact that the picketing here was in support of an economic strike does not warrant denying it the same measure of protection afforded to organizational picketing.

With respect to the Court's second distinguishing factor, that the picketers were employees of the com-

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[19] Member Murphy points out that, irrespective of fn. 30, the concurring opinion herein asserts, in effect, that the differences noted by the Supreme Court are of minimal importance in reaching the result. She disagrees with this approach. To the contrary, inasmuch as the Supreme Court pointed out the existence of these distinctions, it is essential that the Board consider and discuss their importance to the conclusion reached. Like her concurring colleague, she finds that they do not require a different result, but she has joined in attempting to explicate fully the reason for so finding.

[20] See, e.g., *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, 672 (1951); *Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Missouri*, 374 U.S. 74, 82 (1963); *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963); *United Steelworkers of America, AFL-CIO* [*Carrier Corporation*] v. *N.L.R.B.*, 376 U.S. 492, 499 (1964).

[21] In fact, economic activity by a recognized union is not limited as is organizational picketing by Sec. 8(b)(7).

pany whose store they were picketing rather than nonemployees, as were the union organizers in *Babcock & Wilcox*, it is basic that Section 7 of the Act was intended to protect the rights of employees rather than those of nonemployees. With this principle in mind, the employee status of the pickets here entitled them to at least as much protection as would be afforded to nonemployee organizers such as those in *Babcock & Wilcox*.

However, the fact that economic rather than organizational picketing is involved in this case may require a different application of the accommodation principle because of the different purposes sought to be served. It is clear that the Section 7 rights involved in *Babcock & Wilcox*, as in *Central Hardware*, are those of the employees rather than those of the nonemployees seeking to organize them. That is to say, if the employees are beyond the reach of reasonable union efforts to communicate with them, it is the employees' right to receive information on the right to organize that is abrogated when an employer denies nonemployee union organizers access to the employer's property. Similarly, where, as here, economic strike picketing is involved, the Section 7 rights at issue are those of employee, i.e., the pickets' right to communicate their message both to persons who would do business with the struck employer and to those employees of the struck employer who have not joined the strike.

One difference between organizational campaigns as opposed to economic strike situations is that in the

former the Section 7 rights being protected are those of the intended audience (the employees sought to be organized), and in the latter the Section 7 rights are those of the persons attempting to communicate with *their* intended audience, the public as well as the employees. A further distinction between organizational and economic strike activity becomes apparent when the focus shifts to the characteristics of the audience at which the Section 7 activity in question is directed. In an organizational campaign, the group of employees whose support the union seeks is specific and often is accessible by means of communication other than direct entry of the union organizers on to the employer's property, such as meeting employees on the street, home visits, letters, and telephone calls.

Here, the pickets' intended audience comprised two distinct groups: (1) those members of the buying public who might, when seeing Butler's window display inside the Mall, think of doing business with that one employer, and (2) the employees at the Butler store. Although the nonstriking employees at the Butler store were obviously a clearly defined group, the potential customers (the more important component of the intended audience) became established as such only when individual shoppers decide to enter the store.

Hudgens contends that *Babcock & Wilcox* should be read to require that, if television, radio and newspaper advertising is available, the picketers' Section 7 rights must yield to property rights regardless of

the expense involved and regardless of the fact that such forms of communications, in order to reach the intended audience, necessarily must also reach the general populace. As to these contentions, the Administrative Law Judge found, and we agree, that the mass media, appropriately used by the North DeKalb Center and its merchants to attract customers from the Metropolitan Atlanta area, are not "reasonable" means of communication for employee pickets seeking to publicize their labor dispute with a single store in the Mall.[22] Furthermore, Hudgens' suggested approach would undercut Board and Court precedent recognizing and protecting such picketing as the most effective way of reaching those who would enter a struck employer's premises, including situations in which the entrance to the employer's property is on land owned by another.[23]

Hudgens further argues that the Union had other means of access to the public using the Mall in that it could have picketed on the private sidewalk around the Center building or on the public streets and sidewalks near the Center's parking lot. As to the

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[22] 205 NLRB 628, 631.

[23] See, e.g., *United Steelworkers of America* v. *N.L.R.B.*, *supra* at 499. In *Steelworkers*, the union engaged in primary picketing at several entrances to the employer's plant. One of the entrances was a gate for railroad personnel and owned by the railroad. In holding that the union's picketing of the employer on the railroad's private property was not a violation of Sec. 8(b)(4) of the Act, the Court noted that the "location of the picketed gate upon New York Central property has little, if any, significance."

first of these proposed locations, we find, in agreement with the Administrative Law Judge, that the only question the Board is called upon to decide was whether the employees had the right to picket immediately in front of the Butler store in the general walking area used by the invited public inside the Mall. Although the individual who was Hudgens' manager at material times in this proceeding testified that he told the pickets they could picket on the parking lot, the Administrative Law Judge discredited this testimony and noted that even in its brief Hudgens maintained that it had the right to eject pickets from the parking lot as well. As to Hudgens' suggestion that the pickets could have used public streets and sidewalks, the Administrative Law Judge pointed out that Butler is only 1 of 60 stores fronting on the same common inside walkways, that the closest public area—i.e., not privately owned—is 500 feet away from the store, and that a message announced orally or by picket sign at such a distance from the focal point would be too greatly diluted to be meaningful. Further, we find merit in the General Counsel's contentions that safety considerations, the likelihood of enmeshing neutral employers, and the fact that many people become members of the pickets' intended audience on impulse all weigh against requiring the pickets to remove to public property, or even to the sidewalks surrounding the Mall.

As for the third consideration noted by the *Hudgens* Court, that "the property rights impinged upon . . . were not those of the employer against whom

the § 7 activity was directed, but of another," we find that, under the circumstances here, Hudgens' property right to exclude certain types of activity on his Mall must yield to the Section 7 right of lawful primary economic picketing directed against an employer doing business on that Mall. The walkways on the common area of the Mall near the Butler store, although privately owned, are, during business hours, essentially open to the public and, as the General Counsel argues, are the equivalent of sidewalks for the people who come to the Center. Thus, the invitation to the public,[24] as recognized by Hudgens in the "Shopping Center Lease" form and publicized in various advertising and promotional campaigns, is simply "Come to the North DeKalb Center." Specific intent to buy is not a prerequisite to invitee status; the fact that many people buy on impulse is explicitly recognized in the design and layout of the Center's commercial environment. As members of the public, the men who carried the signs were apparently within the scope of the invitation and welcome as long as they did not picket.[25]

Further, we find no merit to Hudgens' assertion that he is a completely neutral bystander in this situation. Although Hudgens is neutral in the sense that he is not the primary employer and is, therefore, not a party to the labor dispute, he is nonetheless

[24] The invitation is to the public in the sense that all members of the public are considered potential customers.

[25] Harold Glenn, one of the pickets, testified that they were told: "You can stay but those signs have got to go."

financially interested in the success of each of the businesses in his Center inasmuch as he receives a percentage of their gross sales as part of his rental arrangement. He provides security and other services on a purportedly neutral basis to assure customer comfort and well-being in order that sales potential be maximized. Although in some ways the security services provided by Hudgens are analogous to those provided by police in the public shopping areas of any town, there are distinctions; e.g., Hudgens' security force can, and as the record shows does, preclude certain types of behavior on the Mall that police could not prohibit on a public street. As the Court made clear, there is no first amendment right to enter such shopping centers to engage in activities that would be accorded first amendment protection in a public street or park.

To the extent that Hudgens' security force protects the Center and its businesses from such activities as, in Hudgens' view, might discomfit, discourage, or intimidate shoppers, Hudgens is protecting his own interests. To the extent that the businesses on the Mall have delegated to Hudgens responsibility for the maintenance of an environment that maximizes the shoppers' peace of mind, and therefore sales, those doing business at the Center are protecting their own interests through Hudgens. By the terms of the lease, part of the rent they pay Hudgens is for such protection.

Furthermore, although Hudgens owns the Mall, as long as the shopkeepers pay their rent, they have

certain rights in the leased property. One of these is the right to have the walkways of the Mall accessible to persons who wish to shop there. Without that right, the leaseholds would, obviously, be worthless. In maintaining the comfort, cleanliness, and security of the Mall, Hudgens is, in a real sense, acting for the shopkeepers who lease their store locations from him. To this degree, he is their agent and, in light of his direct interest in seeing the shopkeepers' profits maximized, his interests in performing the above activities are mutual with those of the shopkeepers.

Picketing in support of an economic strike is intended to have, and certainly may have, economic effects on the struck business. This is true whether the picketing occurs on public or private property. Such activity is a corrollary of the strike itself and is the means by which the striking employees communicate their message to those who would do business with the employer as well as to other employees of the employer. Here, the activity of the pickets in front of the Butler store clearly could affect Hudgens' interests adversely: to the degree Butler's gross sales are diminished, Hudgens' rental percentage figure will likewise be reduced. Furthermore, as a result of our finding that in the circumstances here such picketing is permissible, businesses may find that mall locations are less desirable since such locations will be more insulated from such Section 7 activity than are locations fronting a public sidewalk. To the

extent that this makes mall locations less attractive to businesses seeking retail store sites, Hudgens' interests are further jeopardized.

However, in finding that the *Babcock & Wilcox* criteria are satisfied and that, in these circumstances, Hudgens' property rights must yield to the pickets' Section 7 rights, we are simply subjecting the businesses on the Mall to the same risk of Section 7 activity as similar businesses fronting on public sidewalks now endure. In leasing the shops to the merchants, Hudgens necessarily submitted his own property rights to whatever activity, lawful and protected by the Act, might be conducted against the merchants had they owned, instead of leased, the premises. The effect of our decision obviously is limited to such Section 7 activity and in no way requires Hudgens to open the Mall to any and all who may wish to demonstrate or solicit there. As the *Hudgens* Court made clear, no first amendment considerations are involved.

It is clear, then, that by our holding here we do no more than assure that employees of employers doing business in such malls will be afforded the full protection of the Act. In our view, the national labor policy requires that such employees be afforded that protection. A contrary holding would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls, and would thereby render Section 7 meaningless as to their employees.

On the basis of all the foregoing, we reaffirm our previous conclusion that the respondent, by threatening to cause the arrest of Butler's warehouse employees engaged in picketing Butler's retail outlet in Respondent's shopping center violated Section 8(a)(1) of the Act. Accordingly, we shall reaffirm our original Order in this proceeding.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its Order previously issued herein and orders that the Respondent, Scott Hudgens, Atlanta, Georgia, his agents, successors, and assigns, shall take the action set forth in the Board's Decision and Order (192 NLRB 671), and Supplemental Decision and Order (205 NLRB 628).

Dated, Washington, D.C. June 23, 1977

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

BETTY SOUTHARD MURPHY, Member

PETER D. WALTHER, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

CHAIRMAN FANNING, concurring:

When *Hudgens II* [26] was argued before the United States Court of Appeals for the Fifth Circuit, the Board attempted to support its finding that Hudgens violated Section 8(a)(1) by reference to *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945). To the extent that tack undermined the exclusive reliance upon statutory, as opposed to constitutional, considerations which the language of our decision in *Hudgens II*, as well as that of our prior decision in *Peddie Buildings*,[27] evinced, it was regrettable. For the Board decisions in *Hudgens II* and *Peddie*, were, in my view, based solely upon application of the *Babcock & Wilcox* test. To the further extent the majority opinion, with which I have little quarrel, fails to make that clear, I believe the matter should be emphasized. All, in my judgment, that is involved in the proceeding is that clarification. For, all this proceeding more specifically involves, as did the immediately prior *Hudgens*, is a reasoned accommodation between the rights vested in Hudgens by virtue of the title he holds to real property immediately in front of a mall store and certain legal rights vested in covered employees of a covered employer by virtue of this statute.

As in *Hudgens II*, that accommodation is, in my judgment, on the facts presented, more reasonably struck on the side of the covered employees. That

[26] *Scott Hudgens*, 205 NLRB 628 (1973).

[27] *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB 265 (1973).

Babcock involved organizational activity and this case peaceful, primary, and protected picketing is, in my judgment, irrelevant, and, notably, no litigant to the controversy contends otherwise. The Congress has repeatedly concluded "that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system."[28] As we stated in *Peddie*, it is a right "embodied in Section 7 and . . . given emphasis in Section 13." And, if the matter need be further underscored, it is a right specifically designed to foster the equality of bargaining power that is the entire statute's goal. The right to picket is so intertwined with the right to strike that the two amount to statutory equivalents.[29]

That *Babcock* involved activity undertaken by nonemployees and this case that of employees is, on the other hand, relevant but only to the extent that it more persuasively points to the result reached. If, as in *Babcock*, the rights of the passive audience addressed were considered paramount, certainly, here, the rights of those actively asserting the statutory right should be accorded even greater deference.

Finally, that the property right in *Babcock* was vested in the employer against whom the protected activity was directed and, in this case, in a third

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[28] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 234 (1963).

[29] See, e.g., *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Curtis Bros., Inc.*], 362 U.S. 274, fn. 9 (1960).

party, matters, from the standpoint of those asserting the statutory right, little (*United Steelworkers* [*Carrier Corp.*] v. *N.L.R.B.*, 376 U.S. 492, 499), and from the standpoint of the property right holder who chooses to become a lessor not much, if any, more.

The balance to be struck in this case, therefore, no more favors this Respondent than the *Babcock* one.[30] As our decisions in *Hudgens II* and *Peddie*, the case upon which we relied in *Hudgens II*, make, I believe, clear, a variety of considerations point toward finding a violation. The self-imposed limitations on exclusive use that Hudgens created, the significant diminishment of the employee right involved that the available alternatives for the picketing constitute, and the possibility that the avilable alternatives would enmesh a number of other employers surely more "neutral" to the dispute than Hudgens require striking the balance on the employees' side. I concur, therefore, in my colleagues' disposition.

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[30] Contrary to Member Murphy's understanding of my position, I do not regard the differences noted by the Supreme Court between this case and *Babcock & Wilcox* as of minimal importance in reaching the result in this case. The Court stated the three differences "may or may not be relevant," and I conclude for the same, if more briefly stated, reasons as do my colleagues, that the first is not, the second is, and the third is too, but only slightly. Which is, of course, to say, that the differences, to the extent they are relevant, make this a stronger case than was *Babcock & Wilcox* for finding the violation of Sec. 8(a)(1) found by the Board herein. I do not understand how my position can fairly be characterized as minimizing the importance of those differences to a decision herein.

Dated, Washington, D.C. June 23, 1977

JOHN H. FANNING, Chairman
NATIONAL LABOR RELATIONS BOARD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF THE AMERICAN RETAIL FEDERATION, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER.

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The American Retail Federation hereby files a brief *amicus curiae* in support of the Petitioner, Sears, Roebuck and Co.[1]

I.

INTEREST OF THE AMICUS CURIAE.

The interest of the American Retail Federation as *Amicus Curiae* is set forth in its Brief *Amicus Curiae* filed in support of the Petition for Writ of Certiorari herein.

1. Each party has previously filed with the Clerk of the Court his written consent to the participation of the *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

Amicus emphasizes that the membership of its constituent state and national associations consists of retailers of all sizes including small, locally-owned shops as well as large retail chains. While issues presented by this case concern all retailers, they are of particular importance to the small local retailer, the so-called "mom-and-pop store," which is especially vulnerable to being embroiled in labor disputes not of its own making. This is due to the large number of suppliers, services and transportation companies with which it deals. Such a local business must rely primarily on the local courts for the protection and preservation of its rights.

The Federation believes that the issues presented herein must be considered not only in the context of the major retail chain located in a large urban environment but also keeping in mind the interests of the small retailer in its community.

II.

SUMMARY OF THE ARGUMENT.

The National Labor Relations Act (hereinafter "the Act") 29 U. S. C. § 151 *et seq.*, neither establishes nor protects the right to engage in labor-related activity which trespasses upon private property. Access by union representatives to private property has been required by the National Labor Relations Board and this Court only in the limited context of union organizing efforts and then only upon a showing of necessity. This Court's assertion that "accommodation" of employee rights guaranteed by Section 7 of the Act, 29 U. S. C. § 157 may sometimes require a "yielding" of private property rights, suggests the conclusion that the rights of the property owner must be considered superior until a compelling need to impinge upon those rights can be demonstrated before the National Labor Relations Board.

The National Labor Relations Act provides no means by which an aggrieved property owner can assert and protect its

rights by instituting an unfair labor practice charge before the National Labor Relations Board. Thus, the property owner's only means of placing the issue before the Labor Board is to deny access to the labor organization which can then seek redress by filing an unfair labor practice charge. Forcible expulsion by the property owner of the trespasser is an undesirable means of accomplishing this result. The various states have a deeply rooted interest in obviating the necessity for forcible expulsion because of the confrontation and potential breach of the peace it necessarily entails. Thus, in the absence of recourse to the Labor Board, the state courts provide an acceptable means for the property owner to assert and protect his rights during the pendency of the labor organization's efforts to convince the Labor Board that, in the context of the particular case, the private property must yield. In exercising its jurisdiction to maintain the *status quo ante*, the state court need not rule upon, or even consider, the issues pending before the Labor Board. Moreover, the state court's injunctive order need survive only until the Labor Board determines the issue before it. If the Labor Board determines that the property rights must yield, the state court may vacate its injunction or may be required to do so by the Labor Board through action in the federal courts.

III.

ARGUMENT.

A. Nothing in the National Labor Relations Act Establishes or Condones Trespass Upon the Property of Another. This Court Has Approved Only a Limited Right of Access to Private Property to Accommodate Rights Created Under the Act in NLRB v. Babcock & Wilcox.

In *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) this Court announced a general rule that:

1. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are pro-

tected by § 7 of the Taft-Hartley Act or constitute an unfair labor practice under § 8, due regard for the federal enactment requires state court jurisdiction must yield. . . ."

2. ". . . However, due regard for the presuppositions of our embracing federal system including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the State of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act (citations omitted) or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (footnote omitted) 359 U. S. at 243-244.

Nothing in Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, establishes the right to or condones the commission of an intentional tort or a violation of state civil or criminal law. Section 7 of the Act provides that:

> "Employees shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

No construction of Section 8(a) of the Act, 29 U. S. C. § 158(a), which protects Section 7 rights from violation by employers, holds that employees or union representatives may commit intentional torts or violate state civil or criminal law in furtherance of the exercise of those Section 7 rights. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, No. 75-804, 94 LRRM 2759 (U. S. Sup. Ct., 1977).

Similarly, nothing in Section 8(b) of the Act, 29 U. S. C. § 158(b), provides that intentionally tortious labor organization conduct or violation of other civil or criminal law by employees or labor organizations is prohibited by the Act, unless that conduct restrains or coerces employees in the exercise of their Section 7 rights. No construction of Section 8(b) of the Act protects a property owner from trespass. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25, supra*. A property owner, whether or not the employer of the employees whose rights are involved, will not find protection against trespassory activity under existing federal statute or decision.

It must be concluded that trespass is an activity neither protected nor prohibited by the National Labor Relations Act.

It is illogical to conclude, however, that Congress left this conduct unregulated and open to the free play of opposing economic or physical forces.

> ". . . The protection of private property, whether a home, factory or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises.
>
> "Rather, it has acted against t.. backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat 140, 29 U.S.C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially *create* a no-law area." *Taggart* v. *Weinacker's*, 397 U. S. 233 at 227-228 (1970) (Burger, C. J., concurring) See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. R. 1337 at 1355-1356 (1972).

Moreover, unlike cases where this Court has determined that Congress intended to leave a subject unregulated, *Lodge 76*,

International Assn. of Machinists and Aerospace Workers v. *Wisconsin Employment Relations Commission*, 427 U. S. 132, 92 LRRM 2881 (1976), the states in trespass cases need not rule upon the merits of the parties' positions under the Act. Thus, they have no potential for interference with the administration of a national labor policy.

The right of access to the property of another for the purpose of exercising Section 7 rights is not created by the statute but is a creature of decisional law. It has been established by the Board and approved by this Court to operate in limited circumstances. In *NLRB* v. *Babcock & Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956), this Court held that, in the context of a labor organizing campaign, a property owner has no obligation to open his property to a labor organization seeking to organize his employees unless need can first be demonstrated in a Labor Board proceeding that there exists no suitable alternative means of reaching the employees.

> "It is our judgment however that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders these cases permit." 351 U. S. at 112.

B. The Requirement That Private Property Rights Yield in Limited Circumstances Is Not Based Upon Any Constitutional Considerations. Private Property Rights Are Superior to Those Created by the National Labor Relations Act.

In *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 80 LRRM 2769 (1972) and *Hudgens* v. *NLRB*, 424 U. S. 507, 91 LRRM 2489 (1976), this Court has firmly established that union representatives' access to property in a labor matter is not founded upon any constitutional considerations. That right of access exists only to the extent the Labor Board determines that the property owner's rights must yield to those of employees under Section 7 of the Act.[2]

In *Central Hardware*, this Court emphasized that private property rights prevail absent a showing that they must yield and that this principle has only been established in the context of a labor organizing campaign.

> "The principle of Babcock is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." 407 U. S. at 544-545, 80 LRRM at 2771.

Later, in *Hudgens*, this Court said:

> ". . . Under the Act the task of the Board, subject to review by the Courts, is to resolve conflicts between § 7

2. Thus, those state court decisions denying injunctive relief or overturning criminal trespass convictions based upon the theory that the labor organization's representatives were exercising First Amendment rights are no longer viable. See *Local 802* v. *Asimos*, 227 S. W. 2d 154 (S. Ct. Ark., 1950); *In Re Lane*, 79 Cal. Rptr. 729, 457 P. 2d 561 (1969), *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionary Worker's Union, Local No. 31*, 40 Cal. Rptr. 233, 394 P. 2d 921 (1964); *Maryland* v. *Williams*, 44 LRRM 2357 (Baltimore City Criminal Court, 1959); *Jones* v. *Demoulas Super Markets, Inc.*, 308 N. E. 2d 512 (Supreme Judicial Court of Mass., 1974); *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 547, 122 N. W. 2d 785 (1963); *Millmen Union, Local 324* v. *Missouri-Kansas-Texas R. Co.*, 253 S. W. 2d 450 (Court of Civil Appeals, Texas, 1952).

> rights and private property rights, 'and to seek a proper accommodation between the two.' [Citing *Central Hardware*] What is 'a proper accommodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted. . . ." 424 U. S. at 521.

Thus, this Court has adopted the view that private property rights may or may not be required to yield, or may be required to yield to a greater or lesser degree, depending upon the nature of the labor organization's claim. The Labor Board must determine the extent to which such property rights must yield in each category of situation. In the words of the Court:

> "The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights 'with as little distruction of one as is consistent with the maintenance of the other.' (footnote omitted) The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. (Citations omitted) . . ." 424 U. S. at 522.

Recognizing the factual distinctions between the *Babcock & Wilcox/Central Hardware* cases and the facts presented in *Hudgens*, this Court ordered the matter remanded to the Labor Board for consideration, 424 U. S. at 523. The remanded case is currently pending before the Board.

C. The Exercise of State Jurisdiction to Enforce General Trespass Laws Falls Squarely Within the Garmon exceptions for Those Deeply Rooted in Local Feeling and Responsibility and of Only Peripheral Concern to the Administration of National Labor Policy.

Having concluded, as has this Court, that an owner of private property can deny access to representatives of labor organizations except when the Labor Board requires that the owner's

rights yield to those created by the Act, we turn to a consideration of the role of state courts in applying the general trespass laws of their respective jurisdictions.

Safeguarding its residents from violations of their rights, prevention of violence and maintenance of order are matters of state interest deeply rooted in local feeling and responsibility. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, supra; Linn* v. *Plant Guard Workers*, 383 U. S. 53, 61 LRRM 2345 (1966); *United Automobile Workers* v. *Russell*, 356 U. S. 634, 42 LRRM 2142 (1958); *United Construction Workers* v. *Laburnam Construction Corp.*, 347 U. S. 656, 34 LRRM 2229 (1954). The assertion of jurisdiction by state court in those jurisdictions where the preemption argument has been rejected, has been based upon recognition that there is no other forum in which the property owner may assert its rights. The absence of legal recourse if state jurisdiction is denied breeds contempt for the law, resort to self-help and the inherent risk of violence and breach of the peace. Thus, for example, the Illinois Supreme Court, in *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976) held:

> "In *People* v. *Goduto* (1961) 21 Ill.2d 605, 48 LRRM 2126, we held that the State courts have the power to enforce the criminal trespass laws against nonemployee union organizers under circumstances analogous to the case at bar. In *Goduto*, two defendants entered upon the parking lot of a retail store for the sole purpose of distributing union literature to employees of the store. The defendants were arrested after they refused to leave the property when requested to do so by the store's manager. Their subsequent convictions for trespassing were upheld by this court.
>
> "The foundation of our opinion in *Goduto* was that an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate his property rights. Such a situation would result from our

acceptance of the union's contention that State courts have no authority to act against a trespass by nonemployee union organizers. Since trespass by a union organizer is not an unfair labor practice the NLRB is unable to grant any relief to a deserving employer. If the employer is also denied access to the State courts his only recourse is to employ self-help. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972).

"This imminent threat of violence which is inherent in any situation in which an aggrieved party is denied access to a court of law has been recognized by the United States Supreme Court. In *Linn* v. *United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657, 61 LRRM 2345, the court allowed State court jurisdiction over an action for malicious libel which had resulted from a union organizational campaign. The Linn court noted:

> *'The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands.* The function of libel suits in preventing violence has long been recognized.' 383 U.S. 53, 64 n.6, 15 L.Ed.2d 582, 590 n.6, 86 S.Ct. 657, 664 n.6.

"We consider the foregoing statement fully applicable to the historic and deeply rooted interest of the State in maintaining domestic peace through application of its trespass law remedies. We adhere to the holding of *Goduto* that under the *Garmon* doctrine the States are not preempted from jurisdiction of a trespass action involving nonemployee union organizers." (Emphasis added.) 64 Ill. 2d at 162-163.

Similarly, the New York Court of Appeals expressed this concern in *People* v. *Bush*, 39 N. Y. 2d 529, 92 LRRM 3268 (1976) as did the Alabama Supreme Court in *Taggart* v. *Weinacker's, Inc.*, 283 Ala. 171, 214 So. 2d 913 (1968), *cert. granted* 396 U. S. 813 (1969) *cert. dism.* 397 U. S. 223 (1970) and the Tennessee Supreme Court in *Hood* v. *Stafford*, 213 Tenn. 864, 56 LRRM 2340 (1964).

The risk of violence resulting from resort to self-help to eject a stranger from one's property is substantial. It must therefore be recognized that to deprive a state court of jurisdiction to enforce its trespass laws invites opportunities for confrontation by resort to self-help. To whom does a business owner turn when confronted by a union representative who insists on soliciting employees on the sales floor when other means of communication are readily available? *Fortunoff Silver Sales* v. *Heller*, 94 LRRM 2484 (N. Y. Sup. Ct., 1977). Similarly, where does the property owner turn when a union representative enters a store to convince customers not to purchase goods produced by an unrelated company whose employees are on strike? Absent enforceability of trespass laws or the availability of injunctive relief, the owner is left to his own devices. It is no solution to suggest that forcible ejection *may* result in the filing of an unfair labor practice charge by the union after which the Labor Board may decide whether the property owner, under some balancing test, had to "accommodate" to rights established under the Act.

The danger of the present state of the law is illustrated by the case of *Wiggins & Co.* v. *Retail Clerks Union*, 93 LRRM 2782 (Tennessee Chancery Court, Knox County, 1976). There the plaintiff, Wiggins, owned a plot of land which he leased to Kresge which built a store and subleased a portion to Giant Food Markets. On Giant's opening day, defendant union's representatives established an informational picket on the sidewalk directly in front of the Giant store. Despite the request of Kresge and Giant, the pickets refused to leave the private property. The following day, Wiggins sought and was granted a temporary injunction requiring the pickets to continue their activity beyond the private property line. The union filed an unfair labor practice charge with the Labor Board but never filed a petition with the Labor Board seeking to represent Giant's employees.

The court later dissolved the temporary injunction relying on *Hudgens*.

> "In *Hudgens* the Supreme Court has very clearly said that where a total prohibition against picketing upon all shopping center property was sought, it is a matter to be decided by the NLRB in the first instance. Whether or not the Supreme Court meant to say this, it did. . . . a state court, including this Court, cannot determine whether pickets may be totally excluded from the sidewalks and area surrounding the outside of a shopping center even though that area is private property. If there is to be such a total exclusion, that is for the NLRB to order. The language used by the Supreme Court in *Hudgens* will have to be modified to reach a different result." 93 LRRM at 2783.

The court obviously did not understand the rationale of *Hudgens* or that of *Central Hardware* in overruling *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), nor the *Hudgens* remand to the Board. Neither did it know the limited jurisdiction of the Labor Board. Had the court recognized the primacy of private property rights absent a showing that a "yielding" was necessary, and had the Court understood that the property owner could not institute Labor Board proceedings to determine whether pickets may be totally excluded, its holding surely would have been different. Under its rationale however, the property owner, Wiggins, would have been subjected to an indeterminable period of stranger picketing and trespass with no remedy but self-help, exactly the result dreaded and rejected by its own Tennessee Supreme Court in *Hood* v. *Stafford, supra*.

Since the burden of establishing that property rights must yield to Section 7 rights is upon the labor organization, the proper role of the state court is the preservation of the peace while the Labor Board, upon request of the labor organization, balances the respective needs.

Such is the posture assumed by the New York Supreme Court in *People* v. *Bush, supra*.

> "It would appear to follow that union members such as the defendants in our case, providing they have complied with proper procedures, do not necessarily need to be deprived of legitimate statutory rights by the employment of state trespass law. Under the preemption doctrine of *Garmon*, it is not for us to say whether, had they [the trespassers] applied to the NLRB, they could have brought themselves within the limitations set out in *Babcock* and *Hudgens*. It is our province, however, to say that they should have ascertained these limits as they applied to the picketing in question here before remaining intransigently on private property." 39 N. Y. 2d at 537, 92 LRRM at 3272.

The Illinois Supreme Court in *May*, *supra*, similarly noted this Court's conclusion that private property rights prevail absent a showing of need for encroachment in analyzing its role. In the *May* case, the property owner sought an injunction against the union's trespass. The union filed an unfair labor practice charge with the Labor Board. In approving the lower court's issuance of an injunction,[3] the Illinois Supreme Court said:

> "We do not consider the mere filing of a charge by the union to be sufficient to divest the State courts of the jurisdiction which otherwise results from the exceptions listed in *Garmon*. The fact that a charge is on file does not remove the compelling interests which justify the existence of State jurisdiction. The imminent threat of violence occasioned by an unauthorized trespass is not rendered less immediate by simply filing an unfair labor practice charge, nor is the State's interest in preventing violence any less significant. As a practical matter, acceptance of the appellate court's reasoning would result in the emasculation of the *Goduto* principle since a union could then unilaterally divest the court of jurisdiction by the mere filing of a charge regardless of its merit. We accordingly conclude that the filing of the unfair labor practice charge in the present case did not affect the jurisdiction of the circuit court. See also *Linn* v. *United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 57, 15 L.Ed.2d 582, 586, 86 S.Ct. 657, 61 LRRM 2345; *Hood* v. *Stafford*

3. The Illinois Appellate Court had reversed the Circuit Court of Cook County. 32 Ill. App. 3d 916 (1975).

(1964), 213 Tenn. 864, 378 S.W.2d 766, 768, 56 LRRM 2340, in which State jurisdiction was upheld despite the pendency of various proceedings before the NLRB." 64 Ill. 2d at 163-164.

When the role of the state courts is viewed in this manner, it cannot be regarded as interfering with the Labor Board's primacy in the area of labor law or threatening the existence of a national labor policy. The exercise of state jurisdiction to maintain the *status quo ante* until the Labor Board determines whether the trespass must be "accommodated" is therefore of "merely peripheral concern of the Labor Management Relations Act," *San Diego Building Trades Council* v. *Garmon*, *supra*, and is the traditional function of state equity courts.

The issues placed before the state court can be adjudicated without reference to the merits of the underlying labor dispute. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, *supra*. In fact, the availability of the state forum to maintain the *status quo* enhances the Labor Board's procedures. It provides a means whereby a property owner, concerned with asserting the integrity of his interests, can encourage the trespasser to invoke the Labor Board's processes without the property owner having to resort to self-help or other means which might result in confrontation and a breach of peace.

The duration of the state court's injunction may be brief, lasting long enough for the Labor Board to decide whether and to what degree the private property must yield. State courts which have exercised such jurisdiction have recognized its temporary nature.

> "The temporary injunction entered by the circuit court did not present a potential conflict with Federal labor policy, nor did it aversely affect any rights granted the union by the NLRA. The injunction was narrowly aimed at organizational activity on company property and specifically noted that it was not to apply to solicitation on the public sidewalks adjacent to the Venture parking lot. The

temporary injunction merely had the effect of maintaining the status quo during the pendency of the NLRB proceedings. No prejudice to the union could result from this pattern since the injunction could have been vacated immediately upon an NLRB finding in favor of the union. In the highly unlikely event that the circuit court would refuse to vacate the injunction in these circumstances, the NLRB could provide relief by seeking to enjoin the order of the State court. *NLRB* v. *Nash-Finch Co.* (1971), 404 U. S. 138, 30 L. Ed. 2d 328, 92 S. Ct. 373, 78 LRRM 2967.

"The employer, on the other hand, would suffer serious harm were it unable to secure injunctive relief against nonemployee union organizers while the NLRB was considering whether an unfair labor practice complaint should issue. An employer in Venture's situation cannot obtain equitable relief from the NLRB. (Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1362-63 (1972).) If Venture had been precluded from applying to the State court to maintain the status quo, it would have been required to endure eight months of trespass activity by the union as the result of a charge filed with the NLRB." *May Department Stores Company* v. *Teamsters Local 743*, *supra*, 64 Ill. 2d at 164-165.

The state court, in the exercise of its jurisdiction, is competent to deal with the necessary temporary accommodation of rights under the guidance of the Labor Board. The traditional role of equity courts has required them to deal with issues of probabilities and irreparable harm. Under the guidelines set forth in the *Babcock & Wilcox* decision, the state courts can presently determine which party is more likely to suffer irreparable harm if the *status quo* is not maintained pending Labor Board decision. When the Labor Board rules pursuant to the remand from this Court in *Hudgens*, the state courts will have standards to apply in the context of picketing in

economic disputes, and over time the Board will provide guidance in the context of other situations.[4]

Inasmuch as the exercise of state jurisdiction touches interests deeply rooted in local feeling and responsibility and regulates activity of only peripheral concern to the Labor Act, it is not preempted, absent compelling congressional direction to the contrary. *San Diego Building Trades Council* v. *Garmon, supra*. The absence of such compelling congressional direction, and indeed the existence of a contrary intent on the part of Congress, has already been noted by Chief Justice Burger in his concurring opinion in *Taggart* v. *Weinacker's*, quoted *supra* at p. 5.

The California Supreme Court stands virtually alone in its decision that *Garmon* precludes enforcement of state trespass remedies and its decision in the instant case relies solely on prior decisions within its own jurisdiction.

The California Court bases its conclusion on an erroneous evaluation of the role of the state courts in these matters. In declining jurisdiction it relies on the "arguably protected or prohibited" standards set forth in *Garmon* and expresses concern that the exercise of such jurisdiction will interfere with the administration of uniform national labor policy. See fn. 3, 17 C. 3d 893 at 899, 93 LRRM 2161 at 2163. Clearly, the California Supreme Court viewed the states as becoming involved in deciding the issue of access rather than simply preserving property rights in *status quo* pending Labor Board resolution of that issue.

Further, while the court below recognized the absence of remedy for the property owner as noted by Chief Justice Burger

4. As suggested above, to provide for the property owner's resort to the state courts to seek protection of the state trespass laws, rather than leaving him no remedy except self-help, peacefully encourages labor organizations to place the question before the Labor Board for resolution. The fact that the Labor Board has not yet provided guidance in every situation should not deprive the state courts of jurisdiction.

in his *Taggart* opinion, 17 C. 3d at 905, 93 LRRM at 2166, it nevertheless felt compelled to adhere to its own earlier decisions erroneously construing *Garmon*. The court below then suggested that if its understanding of *Garmon* is incorrect, it was because the *Garmon* rule requires clarification. 17 C. 3d at 906, 93 LRRM 2167.

The better rule is that set forth in the well-reasoned decisions of the Illinois Supreme Court in *May* and the New York Court of Appeals in *Bush* which adopt an appropriate role for the state and leave the decision on the merits to the Labor Board.[5]

IV.

CONCLUSION.

For all the foregoing reasons, the exercise of state court jurisdiction to enforce local trespass laws, which maintain the *status quo* and peacefully encourage resort to the National Labor Relations Board to determine the relative rights of the property owner and labor organization, is not preempted by the National Labor Relations Act. The American Retail Federation therefore respectfully requests that the judgment and decision of the Supreme Court of California be reversed.

Respectfully submitted.

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5. In addition, the Supreme Courts of the following states have considered and rejected preemption of their jurisdiction to enforce the state trespass laws: *Hood* v. *Stafford*, 213 Tenn. 864, 56 LRRM 2340 (1964); *Taggart* v. *Weinacker's*, 283 Ala. 171, 69 LRRM 2348 (1968) *cert. granted* 396 U. S. 813 (1969) *cert. dism.* 397 U. S. 223 (1970); *Moreland Corp.* v. *Retail Store Union*, 114 N. W. 2d 876, 50 LRRM 2092 (Wis. S. Ct. 1962).